88-1851

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN F. WHITE, JR., Secretary of the Pennsylvania Department of Public Welfare, et al.,
Petitioners

v.

MARY BENNETT, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals, acting *sua sponte*, may impose liability on a party as a discovery sanction, where discovery sanctions were neither raised nor considered in the district court and the sanctioned party has had no opportunity to be heard?

2. Whether a federal court, consistent with the principles of Eleventh Amendment immunity, may order state officials to conduct an "audit" of hundred of thousands of records to determine the existence and amount of monetary claims against the state?

3. Whether a federal court may order monetary relief against a state on the theory that the state can pass on some of the cost to the federal government?

LIST OF PARTIES

The petitioners are all officials of the Pennsylvania Department of Public Welfare: John F. White, Jr., Secretary; James R. Adams, Director of the Office of Program Accountability; Clyde Black, Director of the Claims Settlement Division; William Slom, Agent-In-Charge of the Claims Settlement Area Office of the Southeastern Region; Robert J. Henry, Support Director of Claims Settlement Area Office for the Southeastern Region.

The respondents are Mary Bennett and Michaeline Forsythe, on behalf of themselves and all others similarly situated.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 1395 and is reprinted in the appendix at p. 1a-60a. The opinion of the District Court is reported at 671 F. Supp. 343 and is reprinted in the appendix at p. 61a-93a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on January 13, 1989, and the petitioners timely petitioned for rehearing. The court of appeals denied rehearing on February 10, 1989, Pet. App. 199a, and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

1. The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Title IV of the Social Security Act, 42 U.S.C. §§ 601 et seq., provides in relevant part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must--

* * * *

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed[.]

§ 657. Distribution of proceeds

* * * *

(b) Amount collected during any fiscal years beginning after September 30, 1976.

The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d)) be distributed as follows:

(1) the first $50 of such amounts as collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period (with appropriate reimbursement of the Federal government to the extent of its participation in the financing),

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family; and

(4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2), and (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

(c) Collection after termination of assistance; distribution of support proceeds

Whenever a family with respect to which child support enforcement services have been provided pursuant to section 654(4) of this title ceases to receive assistance under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, and pay any amount of support collected, subject to the same conditions and on the same basis as in the case of the individuals to whom services are furnished pursuant to sect 654(6) of this title, except that no application or other request to continue services shall be required of a family to which this subsection applies, and the provisions of section 654(6)(B) of this title may not be applied.

3. Federal Rule of Civil Procedure 37 provides in relevant part:

(b) Failure to Comply With Order

* * * *

(2) Sanctions by Court in Which Action is Pending. If a party...fails to obey an order to provide or permit discovery..., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts hall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[.]

No.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

JOHN F. WHITE, JR.,
Petitioner

v.

MARY BENNETT, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners respectfully ask the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

1. In this case, a class of Philadelphia welfare recipients challenges Pennsylvania's administration of the child support enforcement program established by Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 to 667, and its implementing regulations, 43 C.F.R., Parts 232 and 301 to 307. The petitioners, defendants in the District Court, are the Pennsylvania Secretary of Public Welfare and four subordinate officials. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1343.

a. Title IV-D was enacted in 1975 as a companion program to Title IV-A, Aid to Families with Dependent Children (AFDC). See 42 U.S.C. §§ 601 to 615. Under its terms, any applicant

for AFDC must, as a condition of eligibility for aid, assign to the State any rights that he may have to child support. 42 U.S.C. § 602(a)(26)(A). See also 45 C.F.R § 232.11 (1987).

Within each state, the child support enforcement program must be administered by a "single and separate organizational unit," 42 U.S.C. § 654(3) (1983), referred to in the regulations as the "IV-D agency." 45 C.F.R. § 301.1 (1987). In any month in which the IV-D agency succeeds in collecting the child support which has been assigned to it, it must notify the "IV-A agency"[1] of the amount collected. 45 C.F.R. § 302.32

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[1]The "IV-A Agency" is the arm of the state which administers the AFDC program.

(b)(1987). The IV-A agency must then determine whether the amount collected would, if received by the family on assistance, be enough to make that family ineligible for assistance. Ibid. If so, the family is to be removed from the assistance rolls, its support order is to be reassigned to it, and the IV-D agency is to distribute that month's support collection to the family in lieu of an AFDC payment. Ibid.

If the amount collected is not sufficient to remove the family from assistance, it is to be distributed in accordance with the rather complex formula in 42 U.S.C. § 657(b) and 45 C.F.R. § 302.51. That formula allocates collections between the State (as reimbursement for assistance paid) and

the family; the State in turn passes along part of its share to the federal government. 42 U.S.C. § 657(b); 45 C.F.R. § 302.41.

The respondents' claim is that the petitioners violate this statutory scheme in a number of ways by collecting and keeping support money that ought to be paid to them, and by unduly delaying such payments when they do make them; they claim that these practices also violate the Fifth Amendment's Takings Clause.[2]

b. Pennsylvania's "single and separate" agency for the administration of Title IV-D is the Office of Fraud and Abuse Investigation and Recovery (FAIR),

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[2]A third claim, that the respondents' failure to provide a periodic accounting of support collected violates the Fourteenth Amendment's Due Process Clause, is not involved in this petition. See Pet App. 38a-43a.

in the Department of Public Welfare. Pet. App. 65a-66a. FAIR administers the program in cooperation with local County Boards of Assistance, which administer the AFDC program, and with the domestic relations sections of the respective courts of common pleas, with which FAIR maintains cooperative agreements. Pet. App. 66a; see 45 C.F.R. § 302.34.

In 1981, FAIR was handling about 25,000 open cases in Philadelphia County, that is, cases in which a court had issued a support order. C.A. App. 47, 186.[3] By 1985, this number had risen to 139,000 cases; in any given month, collections were made on 10,000 of these cases. C.A. App. 498.

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[3]The designation "C.A. App. ____" refers to the Appendix filed in the Court of Appeals in this case.

The record contains extensive evidence on the regulations and procedures the petitioners established for handling these cases, but there is no need to discuss them in detail. As the district court correctly noted, "the [respondents] do not contend that the [petitioners'] regulations or procedures violate federal law." Pet. App. 81a. Rather, the respondents proceeded on the theory that the policies established by the petitioners were, in practice, not followed.

c. To prove their claim, the respondents relied chiefly upon the case histories of 78 people to whom the petitioners paid refunds of child support in the first quarter of 1983. Pet. App. 68a, 71a, 77a, 79a. Because of its significance to the case, it is important to understand the exact nature of this information.

In discovery, the petitioners were asked to identify all cases in which the Department of Public Welfare had made a refund of any size in the first quarter of 1983. Petitioners identified 78 such cases. C.A. App. 303-307, 484-487, 508. In each of these 78 cases, the Department, for one reason or another, had collected support that should have gone instead to the AFDC recipient; and this error later resulted in the Department's making a refund. The most common cause for these erroneous collections was a delay in reassigning the support order after the recipient had gone off the welfare rolls; indeed, this was the cause in virtually all the 78 cases. Pet. App. 68a.

It is important to recognize that these 78 cases were not selected randomly and were not representative of

the caseload as a whole. Rather, these cases comprised the entire universe of erroneously handled cases during the quarter in question.

The petitioners did concede, however, that this quarter was fairly representative of all others; that is, that out of the tens of thousands of cases handled during any calendar quarter, there would likely be about 80 handled wrongly. Pet. App. 82a. Two federal audits, which unlike the respondents did rely on a random sample of cases, confirmed this low rate of error. C.A. App. 695 (70 cases examined, 69 handled properly; the sole error favored the recipient); C.A. App. 751 (98 cases examined, 95 handled properly, one error of three favored the recipient).

2. The respondents filed their action in 1979 and the District Court certified a class soon after. Pet. App. 116a. The next seven years were occupied by discovery. At no time during these extensive proceedings did the District Court address, or the respondents raise, any question about the adequacy of the petitioners' responses to discovery requests. The District Court did not issue, and the respondents did not request, any discovery orders of any kind against the petitioners. The District Court never held, and the respondents never claimed, that the petitioners' discovery responses entitled the District Court to draw any adverse factual inferences against the petitioners, either as a sanction for discovery violations or on any other theory.

In 1986, the respondents moved for summary judgment. The petitioners opposed their motion on the ground that the evidence adduced--of isolated failures, in a miniscule percentage of cases, to follow established procedures which themselves were concededly correct--was insufficient to prove class-wide violations of the statute. The District Court summarily rejected this argument with the remark that "it is inappropriate for the [petitioners] to suggest that their policies and procedures control when they fail to follow them," Pet. App. 82a, but did not otherwise discuss the the sufficiency of the respondents' evidence. He granted summary judgment to the respondents.

After considering the parties' proposals for a remedial order, Pet. App. 98a, the District Court ordered

wide-ranging injunctive relief to correct the ongoing violations he had held existed. Pet. App. 98a-115a. He declined, however, the respondents' requests for retrospective relief in the form of class-wide refunds of support improperly collected in the past, plus a class-wide audit of the program's back records to ascertain who should get such refunds. The respondents appealed on this remedial issue, and the petitioners cross-appealed on the issue of liability.

3. The Court of Appeals affirmed the District Court on liability, Pet. App. 19a-28a. Unlike the District Court, however, the Court of Appeals discussed at length the question of the sufficiency of the evidence to prove class-wide violations. In this discussion, again unlike the district court, the Court of Appeals relied heavily upon what it called the

petitioners' "failure to comply with discovery orders," Pet. App. 25a, and their inability to produce in discovery information which, according to the Court of Appeals, federal law required them to maintain, Pet. App. 23a-24a.

Citing Fed. R. Civ. Proc. 37(b)(2)(A)(district court may impose adverse factual inferences as a sanction for failure to comply with discovery orders), Pet. App. 24a, the Court of Appeals held that the petitioners were precluded from challenging the sufficiency of the respondents' evidence on liability; this effectively established the petitioners' liability. Pet. App. 22a-25a. According to the Court of Appeals, "[the petitioners] cannot be heard contending that the [evidence is insufficient] when their apparent non-compliance with federal record keeping

requirements and their failure to make discovery makes any [better evidence] unavailable." Pet. App. 24a. The Court of Appeals' holding was sua sponte; the respondents, as in the District Court, had made no claim for discovery sanctions.

The Court of Appeals then turned to the question of an appropriate remedy and held that the District Court had not gone far enough. The Court of Appeals held that the petitioners should be required to audit their program records in order to notify individual class members of the existence and amounts of any monetary claims against the Commonwealth. Pet. App. 54a-56a. Going further still, the Court of Appeals found that part of the cost of paying such claims would ultimately be borne by the federal government, and held that the Commonwealth should be ordered to

pay such claims to the extent that it would be reimbursed by the United States. Pet. App. 57a-59a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' EXTRAORDINARY USURPATION OF THE DISTRICT COURT'S FUNCTIONS, AND ITS MIS-STATEMENTS OF THE RECORD, JUSTIFY SUMMARY ACTION BY THE COURT.

This case presents an extraordinary departure from accepted norms of judicial decision-making. The Court of Appeals decided the liability part of this case by sua sponte imposing discovery sanctions on the petitioners: an issue which the District Court never considered, which the respondents never raised, and on which the petitioners have never had an opportunity to be heard. Pet. App. 22a-25a. In imposing these sanctions, which in turn effectively established the petitioners' liability, the Court of Appeals relied on "discovery orders" which do not exist

and on "facts" which contradict the record. The petitioners ask the Court for summary action to correct this shambles.

1. The Court has made it clear that discovery sanctions are the business of the district courts, with review by the courts of appeals only for abuse of discretion. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976)(per curiam). The Court has also made clear the "general rule" that "a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 U.S. 106, 120 (1976). The Court of Appeals disregarded both of these principles, usurping the role of the District Court to reach an issue that had not even been raised on appeal, let

alone below. As the Court said in Singleton, this is "an unacceptable exercise of appellate jurisdiction." Id., at 120. Litigation by ambush is bad enough; adjudication by ambush is intolerable.

2. Apart from the fact that it should not have been considering discovery sanctions at all, the most outrageous aspect of the Court of Appeals' decision is its repeated assertion that such sanctions were warranted by the petitioners' non-compliance with "discovery orders." Pet. App. 23a, 25a. Federal Rule of Civil Procedure 37(b) does indeed authorize the district court to impose sanctions on a party who violates its discovery orders, but Rule 37 does not apply here. The petitioners never violated any discovery orders; there were no discovery

orders to violate. The parties handled discovery matters among themselves, as the Rules of Civil Procedure contemplate. The District Court never issued any discovery orders and the respondents never requested any.

3. Nor were the petitioners in fact derelict in meeting their discovery responsibilities. According to the Court of Appeals, the respondents asked for certain information on "all cases in 1982 and the first quarter of 1983," while the petitioners only provided information as to the first quarter of 1983. Pet. App. 22a-23a (emphasis added). In fact, the respondents asked for information from "1982 or the first quarter of 1983," C.A. App. 289 (emphasis added); in providing only the latter, C.A. App. 303-307, the petitioners discharged fully their responsibilities.

The Court of Appeals' remarks about the petitioners' "apparent non-compliance with federal record keeping requirements, "Pet. App. 24a, are similarly unfounded. The respondents requested in discovery detailed information--name, address, amounts and dates of public assistance received, and so forth--about a certain class of cases, and the petitioners answered that they could not obtain this information. Pet. App. 23a; C.A. App. 299-301, 309. Despite what the Court of Appeals found, Pet. App. 23a-24a, the federal government does not require the petitioners to report or maintain this information. The federal government requires the respondents to report, once a year, the gross number of such cases, but not the detailed identifying information sought

by the respondents. C.A. App. 828 (instructions for federal reporting form), 832 (federal reporting form).

The petitioners do not, of course, expect the Court to delve into the discovery proceedings in this lengthy case and resolve those issues. Our point is that the Court of Appeals should not have done so either; by ignoring the proper limits on its function, the Court of Appeals made inevitable the gross errors just detailed.

* * * *

The petitioners know that the Court is not primarily concerned with correcting the errors of the lower courts. But the actions of the Court of Appeals in this case--its refusal to confine itself to the proper role of an appellate court; its grotesque finding

that the petitioners violated orders which the District Court never issued--go beyond mere error to undermine the integrity of the judicial process itself. Once before, the Court found it necessary summarily to restrain the Third Circuit's overreaching on discovery matters. National Hockey League v. Metropolitan Hockey Club, supra. The overreaching in this case is far more egregious.

The liability part of this case presents an important and interesting question: whether the respondents proved that the petitioners were engaged in class-wide violations of the governing federal statute, in light of their concession that the peititioners had adopted policies which on their face comply with that statute. Pet. App. 81a.

This question, however, has received little consideration in the lower courts: the District Court disposed of it perfunctorily, Pet. App. 82a; and the Court of Appeals' consideration was irretrievably distorted by its bizarre excursion into the discovery process. The Court should therefore summarily vacate the Court of Appeals' judgment, and remand with instructions to reconsider the issue of liability.

II. THE REMEDY IMPOSED BY THE COURT OF APPEALS IS FLATLY INCONSISTENT WITH THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE.

In fashioning a remedy that went far beyond that imposed by the District Court, the Court of Appeals rejected the petitioners' argument that the relief contemplated was barred by the Eleventh Amendment to the Constitution. Pet. App. 43a-59a. The Court of Appeals' opinion, by Chief Judge Gibbons, did not trouble to conceal its disdain for this Court's Eleventh Amendment decisions. Pet. App. 51a-52a ("the Court in Hans v. Louisiana, 134 U.S. 1 (1890), rewrote the eleventh amendment...."); Pet. App. 57a ("Neither logic nor consistency has been readily discernable...in the arcane jurisprudence of that constitutional provision, and we are unable to predict with any degree of confidence that a new

day is dawning."). It should therefore come as no surprise that the Court of Appeals' remedy cannot be reconciled with those decisions.

1. In their cross-appeal on remedial issues, the respondents sought "an order directing the [petitioners] to audit their records and to identify the class members whose [child support] payments were wrongfully collected and retained." Pet. App. 43a. Responding to this request, the Court of Appeals first launched into a wholly gratuitious discussion purporting to show that the class members could successfully maintain, in state court, an action against the Commonwealth itself for any such wrongfully maintained payments, Pet. App. 48a-51a, and then concluded that the petitioners should be required

to audit their records "in order to identify class members to whom notice of a potential recovery in state court could be sent."[4]

This relief is indistinguishable from that which the Court condemned in Green v. Mansour, 474 U.S. 64 (1985). In Green, the plaintiffs wanted a federal declaratory judgment establishing the defendants' past violations of federal law, which they could then use to establish liability in state court proceedings, "leaving to the state courts only a form of accounting proceeding whereby damages...would be

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[4]The Court of Appeals also thought that the petitioners might be liable as individuals in a federal action for damages. Pet. App. 51a-54a. This discussion was also gratuitious, since no such issue was before the Court of Appeals. The class in this case was certified, and the case tried in the District Court, as one for declaratory and injunctive relief, not for damages. Pet. App. 62a-63a, 95a-97a.

computed." Id., at 73. The Court held, however, that such a declaratory judgment "would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment," and disapproved this attempt at an "end run" around the Eleventh Amendment. Ibid. Accord Quern v. Jordan, 440 U.S. 332, 346-349 (1979) (approving notice to class members that there exist state procedures for determining whether or not they were wrongfully denied past benefits, but disapproving notices to individual members that they were wrongfully denied benefits in a particular amount). The relief ordered by the Court of Appeals --a similar attempt at and "end run" around the Eleventh Ament--is obviously precluded by Green and Quern.

2. Not content with its "end run" around the Court's Eleventh Amendment decisions, the Court of Appeals also launched a frontal assault. Edelman v. Jordan, 415 U.S. 651 (1974), established that state officials cannot be "enjoined" to pay out retroactive welfare benefits, even if those benefits were wrongfully withheld, because such payments are tantamount to an award of damages against the State itself. The Court of Appeals paid lip service to Edelman but ultimately ignored it.

Rather, the Court of Appeals relied on a series of lower-court cases holding that the Eleventh Amendment does not bar an award of retroactive benefits where state officials are administering a program which is funded entirely by the federal government. Pet. App. 58a, citing Fernadez v. Chardon, 581 F.2d 2 (1st Cir. 1982), aff'd on other grounds

sub nom. Chardon v. Fumero Soto, 462 U.S. 650 (1983) and other cases. The reasoning of these cases is that, where the state is acting merely as a conduit for federal money, an award of retroactive benefits does not injure the state treasury and thus does not implicate the state interests protected by the Eleventh Amendment. The Court of Appeals, following these cases, ordered that the petitioners provide retroactive relief "at least to the extent that [they] will be reimbursed by the United States." Pet. App. 59a.

The problem is that, unlike the programs in Fernandez and the other cases cited by the Court of Appeals,[6] the program here is only partly funded by

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[6]The petitioners do not concede that these cases were correctly decided. The Court has never addressed the validity of their reasoning, which seems to the petitioners to be far from sound.

the federal government. As the Court of Appeals conceded, it is "a matching funds program....The level of federal support varies, but it is always equal to at least 50 percent of the state's expenditures...." Pet. App. 6a. In other words (and assuming a 50 percent matching level), for a state to receive $50 in federal funds, it must first spend $100 of its own money. As the Court of Appeals again recognized, any retroactive benefits that Pennsylvania pays out as a result of the decision in this case will be only partly reimbursed with federal matching funds, Pet. App. 58a. The rest of the expense will be borne by the state treasury. This result directly conflicts with Edelman, supra, and cannot be permitted to stand.

* * * *

The relief the Court of Appeals ordered appears, unfortunately, to reflect that Court's obvious disdain for this Court's Eleventh Amendment decisions, and to reflect likewise a settled purpose to use any excuse to avoid the import of those decisions. The Court should reverse the judgment of the Court of Appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted and, upon review, the decision of the Court of Appeals should be vacated or reversed.

Respectfully submitted,

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Date:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1204 and 88-1267

MARY BENNETT and MICHAELINE FORSYTHE,
on behalf of themselves and all others
similarly situated,
Appellants in 88-1204

v.

JOHN F. WHITE, JR., Secretary of the
Pennsylvania Department of Public
Welfare; JAMES R. ADAMS, Director
of the Office of Program Accountability
of the Pennsylvania Department of
Public Welfare; CLYDE BLACK,
Director of the Claims Settlement
Division of the Pennsylvania Department
of Public Welfare; WILLIAM SLOM,
individually, and as Agent-In-Charge
of the Claims Settlement Area Office
of the Southeastern Region of the
Pennsylvania Department of Public
Welfare; ROBERT J. HENRY, individually,
and as Support Director of Claims
Settlement Area Office for the
Southeastern Region of the Pennsylvania
Department of Public Welfare
Appellants in 88-1267

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

Argued: September 30, 1988
Before: GIBBONS, Chief Judge,
SEITZ, Circuit Judge,
and FARNAN, District Judge*

(Opinion Filed: January 13, 1989)

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* Hon. Joseph Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

OPINION OF THE COURT

GIBBONS, Chief Judge:

The plaintiffs, Mary Bennett and Michaeline Forsythe, are class representatives in a class action which challenges the manner in which Pennsylvania Officials administer the child support enforcement program established by Subchapter IV-D of the Social Security Act, 42 U.S.C. §§ 651-667, and its implementing regulations. The class consists of all present or former recipients of public assistance, residing in Philadelphia, who assigned their own and their childrens' rights to child support to the Pennsylvania Department of Public Welfare (DPW), and whose support money is actually being collected by DPW. The

class representatives obtained a summary judgment in favor of the class, but appeal from the limited relief ordered by the district court. The defendants are John F. White, Jr., Secretary of DPW, James R. Adams[1], Director of the Oifice' of Program Accountability of DPW, Clyde Black, Director of the Claims Settlement Area Office for the Southeastern Region of DPW, and Robert J. Henry, Support Director of the same Settlement Area Office. These defendants cross-appeal, contending that their cross-motion for summary judgment should have been granted. We hold that summary

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[1]The complaint named as defendant, Helen O'Bannon, Mr. Adams' predecessor as Secretary of DPW. The docket entries do not disclose that any order was ever entered dismissing the complaint against O'Bannon.

judgment in favor of the class was required, but that the limited relief ordered was, considering the nature of the violations found, legal error or an abuse of discretion. Thus we will affirm the liability judgment in favor of the class, but remand for reconsideration of further relief.

I.

Pennsylvania has elected to participate in the federal spending program authorized by Subchapter IV-A of the Social Security Act, 42 U.S.C. §§ 601-615. That title authorizes expenditures for aid to families with dependent children in states which have submitted and have had approved by the Social Security Administration a plan for aid and services to needy families with children (AFDC recipients). This

federal spending clause program is a matching funds program intended to encourage state aid and service to AFDC recipients. The level of federal support varies from year to year and from state to state, but it is always equal to at least 50 percent of the state's expenditures for AFDC purposes. 42 U.S.C. § 1301(a)(8), 1396d(b). A state plan for such aid and service must, among other features, "...provide that, as a condition of eligibility for aid, each applicant or recipient will be required -

> (A) to assign to the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the

applicant is applying for or receiving aid, and (ii) which have accrued at the time the assignment is executed.

42 U.S.C. § 602(a)(26)(A). The assigned third party payments are collected by the state agency, which may from the collected payments reimburse the state and the federal government in proportion to their respective participation in assistance to the AFDC recipients. 42 U.S.C. § 657(b)(4). Federal reimbursement is accomplished by deducting from federal grants the net amounts of assigned support payments recovered by the state in the prior quarter. 42 U.S.C. § 603(2)(B),(C); 45 C.F.R. § 302.51. The state plan must provide that "[w]hen a family ceases receiving assistance under the State's Subchapter

IV-A plan, the assignment of support rights under § 232.11 of this title terminates except with respect to the amount of any unpaid support obligation that has accrued under such assignment." 45 C.F.R. § 302.51(f). Furthermore "[i]f the amount collected is in excess of the amounts required to be distributed [to reimburse the state or the federal government], such excess shall be paid to the family." 45 C.F.R. § 302.51(b)(5).

When periodic third party support payments for a child exceed the amount of AFDC assistance for the child for a period, the state plan must provide for a determination whether if treated as income the support payments render the child ineligible for assistance. Such redeterminations must occur within two months after the support is collected. 45 C.F.R. § 232.20(b)(1). The plan must

provide that the recipient be notified of the termination of eligibility, and entire third party support payments must be paid the recipient in the month for which ineligibility was determined. Id. The plan must also provide that if public assistance stops, the state may only continue to collect current third party support payments for a maximum of three months, unless the recipient authorizes an extension. 45 C.F.R. § 302.51(e). All support payments collected after termination of assistance, however, are for the benefit of the recipient. "The state may not charge fees from support collections and must pay all amounts collected which represent monthly support payments to the family." Id. Thus, as is typical of federal spending clause programs, Pennsylvania has entered into a contractual undertaking with the United

States that in exchange for federal benefits it will operate a state program in accordance with federal requirements. See, e.g., Delaware Dept. of Health v. U.D. Dept. of Educ., 772 F.2d 1123 (3d Cir. 1985).

II.

The class representatives' complaint, filed on May 1, 1979, alleges the AFDC arrangements for collection of third party support payments outlined above, and the responsibility of the named defendants for compliance with those arrangements. It alleges that DPW arranged with the Philadelphia Family Court and other courts for third party support payments to be made to it, during the continuance of AFDC assistance in amounts in excess of the amount the state was entitled to, and to

continue such payments after assistance was terminated. The complaint alleges that the defendants wilfully and maliciously refused to account for such excess collections. In the absence of an account, it is alleged, AFDC recipients cannot determine whether the state is retaining support payments which belong to the recipients. This conduct, the complaint alleges, violates Subchapter IV-D of the Social Security Act, the implementing regulations thereunder, and the Due Process Clause of the Fourteenth Amendment. The prayer for relief requests that the court:

59. Declare this action a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure;

60. Declare defendants' actions and procedures invalid and unconstitutional under the Social Security Act, 42 U.S.C.

§§ 601 et seq. and 651 et seq.; 42 U.S.C. § 1983; and the Due Process Clause of the Fourteenth Amendment.

61. Preliminary and permanently enjoin defendants' future retention of monthly support collections in excess of public assistance rendered;

62. Preliminarily and permanently enjoin defendants from retaining monthly support collections after public assistance has terminated;

63. Preliminarily and permanently enjoin defendants from refusing to provide recipients with periodic accountings of support monies collected and public assistance expended;

64. Order that defendants pay to the plaintiffs all support monies collected in excess of public assistance rendered, including reasonable interest;

65. Order that defendants pay reasonable interest to the plaintiffs on all support monies held by the plaintiffs after assistance terminated;

66. Award the plaintiffs their costs and reasonable attorneys fees;

Prior to the filing of an answer the defendants moved, pursuant to Fed.R.Civ.P. 12(b), to dismiss the complaint. That motion was denied, and the district court granted the class representatives' motion for a class determination. The defendants answered on October 15, 1979. The answer does not put in issue the allegations of the complaint with respect to the federal requirements of the AFDC plan for collection of child support payments. It admits that the defendants do not provide regular statements of account of

child support collections to AFDC recipients, but denies that such accounts are necessary in order to determine if refunds are owed. It alleges that errors which resulted in overcollections of support payments were made, not by the defendants, but by the Philadelphia Family Court. Affirmatively, the defendants plead that "[i]nsofar as the plaintiffs seek an award of damages and other payments from the state treasury, plaintiffs' claims are barred by the Eleventh Amendment to the Constitution of the United states: The answer also pleads affirmately that "[t]he defendants have acted at all times in good faith belief in the legality of their conduct, and are therefore entitled to immunity from damages."

The class representatives engaged in extensive discovery. On July 14, 1986, the parties filed a stipulation as to certain facts. Both sides moved for summary judgment. Each side contended that there were no disputed issues of material fact. The class representatives' motion requested that the court

> order defendants to comply with federal requirements governing defendants' collection of child support, order defendants to make correct refunds of support owing to plaintiffs and to pay plaintiffs interest on support payments wrongfully retained by defendants, and order defendants to provide plaintiffs with a periodic accounting of support collected and assistance rendered.

The defendants requested that judgment be entered in their favor because on the summary judgment record, by this time an extended one, they were entitled to judgment as a matter of law.

The district court, reviewing the summary judgment record, concluded that it required a holding that the defendants: (1) violated Subchapter IV-D and the implementing regulations by failing to reassign support payments promptly upon the termination of assistance; (2) violated Subchapter IV-D and the implementing regulations by failing to make prompt payment of support payments collected after AFDC assistance terminated; (3) violated Subchapter IV-D and the implementing regulations by failing to make prompt payment of excess support collected; (4) violated Subchapter IV-D and the implementing regulations by improperly collecting support payments for more than three months after AFDC assistance terminated, without the recipient's authorization; (5) violated Subchapter IV-D implementing regulations by failing

to notify AFDC recipients that the Philadelphia Family Court would continue to collect support after AFDC payments terminate; (6) violated the due process clause of the fourteenth amendment by miscalculating refunds, thereby retaining support monies which belonged to children and parents on whose behalf those monies were paid and by refusing to pay interest on support payments wrongfully withheld; (7) violated the due process clause of the fourteenth amendment by failing to provide periodic statements to AFDC recipients showing the amount of third party child support collected by DPW. On October 5, 1987, the court ordered that:

> Within thirty (30) days of the entry of this Order, counsel will submit to the Court a joint proposal that addresses the following: a remedy with respect to the defendants' mishandling of cases, a list of outstanding refund payments, and procedures which, if adopted, would improve the defendants' system. Counsel will also submit a joint proposal concerning the language of a monthly statement that contains information regarding support collected, the manner in which refunds are calculated, and the procedures for asserting a refund claim.

In compliance with the October 5, 1987 order, the parties submitted proposals for remedial orders. The district court, on February 19, 1988, entered an order substantially in the form proposed by the defendants. The appeal by the class representatives and cross-appeal by the defendants followed.

III.

The defendants contend that the district court erred in holding that the summary judgment establishes any violation by them of federal statutory or constitutional law. The defendants do not dispute that the record discloses instances of failure to reassign support orders on termination of assistance, failure to make prompt payment of collections made after termination of assistance, failure to pay over support collected in excess of what is due the state for reimbursement of AFDC assistance, continuation of collections for more than three months after termination of assistance, and failure to notify recipients that the Family Court would continue collections

of support after termination. Nor do they dispute that the record discloses 46 calculation errors in favor of the state in a sample of 78 cases. Finally, they do not dispute that they do not give recipients a periodic accounting of support collected or assistance paid. Rather, they urge that the evidence establishes violations which are so minuscule that a judgment in favor of the class was improper, and judgment should have been entered in their favor. They urge, further, that due process does not require that they make periodic accountings of support collections and assistance payments.

The defendants do not contend that the court abused its discretion in approving a class action. Our review of the summary judgment in favor of the class is plenary. E.g., Pollack v. American Tel. & Tel. Long Lines, 794

F.2d 860, 864 (3d Cir. 1986). In this case, moreover, the defendants concede that "[t]he appeal as to the liability issue does not raise factual questions." Appellees Brief p. 21. Thus our review with respect to the liability determination narrows to the question whether, given the undisputed facts relied upon by the district court, the class members are entitled to judgment as a matter of law.

The defendants' principal legal argument is that the summary judgment record discloses that they have adopted regulations for the collection and distribution of support payments which comply with the governing federal statutes and regulations. This, defendants urge, is all they are legally required to do. The district court aptly responded to this argument that it

is "inappropriate for the defendants to suggest that their policies and procedures control when they fail to follow them."

Alternatively, the defendants urge that the evidence in the summary judgment record is insufficient as a matter of law to support the liability judgment. The class representatives rely on a sample of 78 support collection cases from the first quarter of 1983. These 78 cases include all refunds paid by DPW during that quarter. In 46 out of 78 cases the refunds were miscalculated. During discovery, the class representatives requested that defendants disclose information on all cases in 1982 and the first quarter of 1983 for which a refund of excess support collections were made.

Defendants only provided information as to the first quarter of 1983. Defendants were also asked to produce a list of all AFDC recipients whose aid was terminated during 1982 or the first quarter of 1983, because support payments rendered them ineligible for AFDC assistance. The defendants responded that they could not answer the question because they didn't have the necessary records. The defendants are required, however, to furnish this same information annually to the Federal Office of Child Support Enforcement pursuant to Form OCSE-3 and 45 C.F.R. 302.15(a). (App. at 822 & 828). The defendants' inability to comply with discovery orders permits the legitimate inference that DPW's record keeping does not satisfy federal requirements. The information sought was not available to the class representatives

other than from the defendants. The defendants cannot be heard contending that the sample of 78 cases on which the district court relied is an unrepresentative cross-section, when their apparent non-compliance with federal record keeping requirements and their failure to make discovery makes any more representative cross-section unavailable. See Fed.R.Civ.P. 37(b)(2)(A).

The 78 refund cases represent all refunds paid in a quarter. In 46 instances refunds were miscalculated; an error rate of almost 60%. There is also evidence in the summary judgment record that the Federal Office of Child Support Enforcement determined in an audit that the Philadelphia Family Court holds substantial sums. Out of 343 AFDC support accounts with money on hold, 96 had been on hold for more than a year.

Given the large percentage of miscalculations in the 78 cases on which evidence was submitted, the evidence of failure to keep adequate records, the evidence of long delays in disbursements disclosed in the federal audit, and the defendants' failure to comply with discovery orders, we must hold that the class representatives came forward with a prima facie case suggesting the violations of Subchapter IV-D and its implementing regulations found by the district court. As the defendants acknowledge, there is no contrary evidence which puts that prima facie case in issue. Thus the liability judgment in favor of the class for violations of Subchapter IV-D and its implementing regulations must be affirmed.

The defendants also contend that the court erred in finding violations of the due process clause of the fourteenth amendment. We have noted above that refund calculations contained errors in favor of the DPW in 46 out of 78 cases in which refunds were made. Defendants do not dispute that as a result of these mistakes DPW held on to class members' property. The district court concluded that this resulted in a taking of the class members' property without compensation. Moreover, the district court found, and the record supports the conclusion, that besides the miscalculations, other class members never received any refunds of child support payments to which they were entitled. Thus we reject the contention that the record does not support a finding that

the defendants have committed a substantive fourteenth amendment violation by making uncompensated takings.

The class representatives sought a determination that procedural due process required that the defendants account periodically to all class members for child support payments collected. The district court ruled that an accounting was required. The defendants point out that in 1948, Congress amended Subchapter IV-D to require that states provide AFDC recipients with an annual accounting of support collected on their behalf. 42 U.S.C. § 654(5); 45 C.F.R. § 302.54 (1985). They point out, moreover, that as a part of a court-approved settlement of another lawsuit, Shenigo v Cohen, No. 85-7221 (E.D.Pa. Fed. 10, 1986), the DPW

has agreed to provide recipients with monthly accountings of support collected on their behalf. Thus, they contend, no further procedural due process should be required. The class representatives' procedural due process claim is, of course, a separate basis for potential liability. It is, however, closely related to the question of an appropriate remedy for the federal statutory and taking violations which we find. Thus it will be discussed in Part IV below.

IV.

The class representatives contend that the district court's remedial order inadequately deals with the violations found, and must be modified. The defendants contend that assuming, as we

have found, that violations occurred, the remedial order fairly addresses those violations. The scope of a remedial order is ordinarily committed to the informed discretion of the district court, and we review it for an abuse of that discretion. Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., 556 F.2d 167, 178 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). In exercising that function, we must "examine the decree in light of the record to see that the relief it affords is adequate to prevent recurrence of the illegality which brought on the given litigation. "United States v. Loew's, Inc., 371 U.S. 38, 52 (1962). The decree must also make persons whole for past injuries suffered. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

Thus our task is to determine whether the district court in fashioning the decree adequately took into account the need to prevent future violations, and the need to remedy past violations.

The district court ordered the defendants to adopt a new computer reassignment system which it was going to adopt in any event. The defendants are ordered to test the new system for a year and notify the class representative of the results. The order requires that notice of reassignment rights be attached to notices terminating or suspending AFDC assistance. The DPW is required to employ reassignment personnel, to create a reassignment telephone hotline, and to keep a computer terminal free for reassignment questions. DPW is also required to take specific steps to ensure that support payment after the assignment terminates

and excess support payments prior to termination shall be refunded. Recognizing that collection of support payments is made by the Philadelphia Family Court on behalf of DPW, the order directs the defendants to use their "best efforts" to ensure that the Family Court complies with the order. The defendants are directed to correct 46 specific miscalculations of refunds reflected in the summary judgment record. They are also directed to send a monthly accounting to all persons whose support payments are sent to DPW. The accounting must include information on entitlement to refunds and on procedure for obtaining them. The DPW is required to provide instruction and training for personnel in the Office of Fraud Abuse in charge of support collections and refunds, but is required

only to use its "best efforts" to ensure that Family Court personnel are properly instructed and trainer. Finally, the order provides:

> In the even that there are material changes in the governing federal statute or regulations, nothing in this Order shall be construed so as to prevent DPW from complying with them, or imposing on DPW a more stringent or restrictive requirement than the statute or regulations.

The class representatives contend that the decree is defective in six respects.

First, the class representatives contend tnat while the computer based reassignment system appears to be an adequate response to the reassignment violations found, it is not currently functioning. Electronic transmission of DPW computer tapes to the Family is not

required until new equipment is in place, and no date is fixed for the installation of such equipment. Meanwhile the order requires that DPW mail the tapes to the family court daily. The class representatives proposed that a back-up paper reassignment system be implemented immediately, to function until the computer system is fully in place. They complain that the court order requiring reassignment by sue of the mailed computer tapes is not being complied with. We conclude that the rejection of the class representatives' back-up paper reassignment system as a part of the remedy is within the permissible range of district court discretion in fashioning a remedy to prevent recurrence of the violations found. If the order

as drawn is not being complied with, the appropriate remedy is a contempt proceeding.

Second, the class representatives contend that the decree does not contain provisions requiring the reassignment of support orders promptly following termination of assistance. The order requires that a computer tape be made of all case closings, for matching against support orders in the Family Court. Case closing include terminations of all family assistance. The class representatives point out that there are also partial terminations; a cut-off to one member of a household. Out of 78 termination-refund cases examined, 14 were such partial terminations. The problem of such partial terminations has been mitigated to a large extent by 1984 changes in the federal law, which now mandates that the income of an entire family be included for purposes of AFDC

benefit determination. 42 U.S.C. § 602(a)(38). The class representatives claim that there still could be situations where one child is not the sibling of the other children in the house, and a partial termination could result. We think, however, that when read in light of the 1984 changes in the law and requirement in the decree for monthly accounting which includes a refund calculation, the decree is within the permissible range of district court discretion to fashion a remedy which will prevent recurrence of the violations found.

Third, the class representatives contend that by limiting to "best effort" the defendants' responsibility with respect to the performance of reassignment functions the court has in

effect relieved them of obligations imposed on them, and not the Family Court, by the governing federal law. Under that law, when the DPW delegates Subchapter IV-D functions to a local agency such as the Family Court, it remains accountable and responsible for the operation of the program, and must ensure that those functions are being carried out promptly, efficiently and effectively. 42 U.S.C. § 654(7); 45 C.R.F. /§§ 302.12(2), (3). Given that responsibility, the class representatives urge, the district court erred in requiring that DPW only use "best efforts" to assure that its agent, the Family Court, complies with the law. This contention has merit. The decree should require that the persons in charge of DPW and its Office of Fraud and Abuse, which have contracted with the federal government to be responsible

for compliance, shall see to it that their agent complies. See Kruelle v. New Castle County School District, 642 F.2d 687, 696-97 (3d Cir. 1981).

Fourth, the class representatives contend that including the provision in the decree permitting the defendants to comply with future changes in federal law inconsistent with its provisions was an abuse of discretion. Arguably, that provision, quoted in Part III above, goes further in accomodating possible future changes in federal law then would be required under Fed.R.Civ.P. 60(b)(5) because of a change in the law. The order is also somewhat problematic in permitting the defendants to change their level of compliance without notice to the class representatives or consent of the court, See Fed.R.Civ.P. 60(b)(5).

The district court was entitled, however, to recognize that DPW, acting through the defendants, has an ongoing contractual relationship with the federal government, which requires a degree of flexibility with respect to future developments. While the provision might well have been drafted in such a way as to put the onus on the defendants to seek modification, rather than on the class representatives to police defendants' behavior, we are unable to hold that the inclusion of the provision as drafted was an abuse of discretion.

Fifth, the class representatives contend that the monthly accounting to class members ordered by the district court is legally insufficient in that the required accounting will not inform

recipients of the amount of public assistance rendered to the family during the month, and the calculation of how much support payments may be offset against those payments. The purpose of the monthly accounting, according to the district court, is to enable class members to initiate collection efforts in the event of illegal retention of their support payments. How, the class representatives ask, can class members do this if the monthly accounting does not include information about assistance payments, the amounts of which determine whether support payments may be retained by DPW. The district court's response to this contention is that "[r]ecipients should be able to keep a record of how much assistance they have received." 671 F.Supp. at 350. This is hardly a complete response to the class representatives' argument. It is true that the

recipients receive, and therefore theoretically can remember the amount of assistance received. This, in theory, they can compare the monthly accounting of support payments collected with the amount of benefits received. Recipients must also know, however, the regulations as to when and to what extent offsets of support payments against AFDC assistance payments is permitted. Moreover, the defendants are required by federal law to make the calculations. Thus what the class representative seek is information about a calculation which the defendants are obliged to make in any event.

In Ortiz v. Eichler, 794 F.2d 889, 893-94 (3d Cir. 1986), this court considered what notice should be given by state agencies administering federal spending clause programs (AFDC, food stamps and Medicaid) before terminating

such benefits. Applying the balancing of interests test required by Matthews v. Eldridge, 424 U.S. 319, 334 (1976), we held that the district court did not err in requiring that the agencies disclose their calculations. This case is different from Ortiz v. Eichler, in that here the district court did not order such disclosure in the notice. Ortiz v. Eichler did not, however, affirm the district court's exercise of discretion in fashioning a decree. The opinion cites approvingly Dilda v. Quern, 612 F.2d 1055, 1057 (7th Cir.)(per curiam), 447 U.S. 935 (1980), which holds that the failure of the court to include the state agency's calculations in an AFDC benefits termination notice violates procedural due process. Thus Ortiz v. Eichler controls with respect to the adequacy of

notice unless a material distinction may be made for Matthews v. Eldridge purposes between retained support payments, on the one hand, and AFDC, food stamps, and Medicaid benefits, on the other. The interest of class members in third party child support payments is self-evident. It is not the wealthy who will have had to make assignments of such payments to obtain AFDC assistance. The burden on DPW, which must in any event make the calculations, is by comparison slight. The additional safeguard which would be provided by notice of the calculations against errors such as those disclosed in this record would be quite significant. No principled basis occurs to us for distinguishing Ortiz v. Eichler. The district court erred as a matter of law, therefore, in failing to require an

accounting notice which includes the agency's calculations of support payments and AFDC assistance payments against which they are being offset.

The class representatives' sixth and final objection to the decree, and probably the most significant, is that, except for the 46 identified cases of erroneous calculations as to which the court ordered payment, without interest, of withheld child support payments, the decree affords no remedy to class members for past takings of their property. The class representatives seek an order directing the defendants to audit their records and to identify the class members whose payments were wrongfully collected and retained. They also contend that interest should be paid on the 46 claims of miscalculated refunds which were found. The district

court opined that "[w]hile the Eleventh Amendment bars the payment of interest to plaintiffs, it certainly does not preclude the payment to plaintiffs of their money which the defendants withheld improperly." 671 F.Supp. at 349 (footnote omitted). The defendants acknowledge that "[t]he district court...properly concluded that the miscalculated refunds should be corrected and, of course, they will be." Appellees' Brief p. 35. However, while they concede that these refunds must be paid, they urge that both the interest on the 46 miscalculated refunds, and an audit to discover what other class members are owed refunds, are forms of relief barred by the Eleventh Amendment.

Several observations are required in order to put the Eleventh Amendment argument in perspective. First, this is a suit against state officers. The state is not a party. Thus there is no question that the district court had subject matter jurisdiction to entertain this federal question case. Ex Parte Young, 209 U.S. 123, 155-56 (1908); United States Bank v. Planters' Bank of Georgia, 22 U.S. 904 (9 Wheat.)(1824). Second, this is not a case in which the class representatives are attempting to obtain, in an Ex Parte Young type action in federal court, relief against the state treasury pursuant to a state statute. See, e.g., Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1985)(suit against Indiana Department of Treasury). Relief here is sought pursuant to 42 U.S.C. § 1983. Third, this is not a case in which the class

representatives seek recovery of money raised by the state through its general revenue sources. While the state's general revenues are utilized to pay the state's share (approximately half) of AFDC assistance payments, the monies in dispute here, unlike lawfully offset child support payments, are sums as to which the state never had any legitimate claim. The collected support payments here in dispute, because of the deficient operation of the Subchapter IV-D program by the state, were simply converted by the defendants and paid over to DPW. Fourth, the program which put the defendants in the position to collect and retain the child support payments was one which the state entered into voluntarily by contract with the United States, and the conversions violate the

terms of that voluntary and legally binding undertaking.[2] Thus the issue presented is a narrow one: when state officials convert money or property which came into their hands in the course of administering a federal spending program and turn that money over to the state, are the owners of such property constitutionally barred from any remedy against either the officers or the state. The defendants insist that the Eleventh Amendment requires an affirmative answer. And, if recovery is foreclosed, they urge, there should be no accounting.

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[2]Approximately fifty percent of the withheld support payments, while nominally in the state treasury, actually inures to the benefit of the federal government, since its next quarter federal AFDC contribution will be reduced in proportion to child support payments collected by the state in the prior quarter. 42 U.S.C. § 657b(2), (4).

In considering the defendants broad assertion of unameanability to a remedy for conversions which violate federal law, it is useful to consider first the question whether relief could be granted in any court, and then any separate limitations on the remedial powers of the federal courts imposed by the Eleventh Amendment.

It has been settled since Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U.S. 226 (1896), that fourteenth amendment due process include a substantive prohibition against state takings of private property without compensation equivalent to express prohibition in the fifth amendment against such takings by the federal government. It has also long been settled that a component of just compensation includes interest for the

period during which compensation has been withheld. Kirby Forest Industries v. United States, 467 U.S. 1, 11 (1983); Phelps v. United States, 274 U.S. 341, 344 (1927); Seaboard Car Line Ry. v. United States, 261 U.S. 299, 305 (1923); United States v. Rogers, 255 U.S. 163, 169 (1923). We are here affirming the district court's holding that by collecting and retaining child support payments to which it is not entitled DPW has taken property without compensation. Pennsylvania has had the use of the class members' property; they have been deprived of such use, and its obligation to pay compensation for such use includes an interest component. Section 1983 provides a federal cause of action for the vindication of substantive

violations of the fourteenth amendment. State courts have concurrent jurisdiction with the federal courts over section 1983 actions. Maine v. Thibedeaux, 441 U.S. 1 (1979). In such actions, they must also enforce 42 U.S.C. § 1988 by awarding fees to the prevailing party. Id. Moreover, a state court could not decline to enforce this federal law cause of action for the recovery of just compensation. Testa v. Katt, 330 U.S. 386 (1947)(state courts of general jurisdiction are under constitutional obligation to enforce federal causes of action); Mondou v. New York NH & H R.Co., 223 U.S. 1 (1912)(same); General Oil Co. v. Crain, 209 U.S. 211 (1908)(state courts must entertain suits against state officials for vindication of federal constitutional rights). In these and other cases on direct review

the Supreme Court enforced the state courts' obligation to enforce federal law causes of action. See also Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 760 (1982)(rejecting tenth amendment challenge to federal statute imposing adjudication duties on state tribunal). The eleventh amendment has no application to state courts. Thus it is plain that in a state court of general jurisdiction the class members could recover just compensation, including interest, for their property which the state has unlawfully retained.

It has also been settled since Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824), and United States Bank v. Planters Bank of Georgia, 22 U.S. 904 (9 Wheat.)(1824), that the eleventh amendment is no bar to relief against state agents. While the Court

in Hans v. Louisiana, 134 U.S. 1 (1890), rewrote the eleventh amendment in other respects, it shortly made clear that the rewriting did not change the settled law that federal courts could entertain suits against such agents. Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Ex Parte Young, 209 U.S. 123 (1908). In this case the class representatives have sued state agents, seeking, in the words of the complaint, an "[o]order that the defendants pay to the plaintiffs all support monies [unlawfully withheld] including reasonable interest." The complaint makes no distinction respecting such relief against the defendants in their official capacities rather than individually. The defendants obviously so read the complaint, since they pleaded the defense of official immunity,

a defense which only serves to insulate defendants from individual liability for damages. In moving for summary judgment the class representatives did not retreat from the relief requested in the complaint. In responding to that motion, the defendants presented no affidavits containing and we have found in the summary judgment record no materials suggesting that there is a factual basis for the affirmative defense of qualified official immunity. In the context of this case, such immunity would be available only upon a showing by the defendants that there was a reasonable doubt, at the time they acted, as to the DPW's entitlement to the retained funds. Anderson v. Creighton, 107 S.Ct. 3034, 3039 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818

(1982). Thus it appears that the individual defendants might remain liable for conversions of property for which they were initially responsible, even though they turned the property over to their principal, the DPW. Restatement, Agency § 349.

Keeping in mind that the state itself is liable to pay compensation, and that liability may be enforced in a state court, and that the state agents who converted the property may also be held liable even in a federal court, we turn to the DPW's objection to an accounting. That objection is predicated upon Edelman v. Jordan, 415 U.S. 651 (1974), in which the Supreme Court held that although suits against state officers could be entertained in the federal courts, the eleventh amendment prevented the remedy of an injunction requiring the payment of funds raised from general revenue sources out of the

state treasury. The district court was, of course, bound by precedent. It was also bound, however, by the sequel to Edelman v. Jordan, in which the court approved as relief ancillary to a declaratory judgment a notice to claimants advising them that a state procedure was available to which they might resort for the collection of past benefits. Quern v. Jordan, 440 U.S. 332 (1979). As was the case in Quern v. Jordan, though not in Green v. Mansour, 474 U.S. 64 (1985), there is here in place an injunction against continuing violations of federal statutory and constitutional law to which such ancillary notice type relief is properly ancillary. Thus even aside from the question of individual liability, there is a basis in law for requiring the DPW to audit its records in order to identify

class members to whom notice of a potential recovery in state courts could be sent.[3] An audit for the purpose of identifying class members to whom the defendants may be individually liable is an a fortiori case.

The class representatives urge a broader proposition. They urge that Edelman v. Jordan should be construed as inapplicable to their suit because they are not seeking the recovery of entitlements to government benefits funded by general revenues, but only the recovery of their own property. The argument has the appeal of logic and consistency with the justifications some-

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[3]Of course, the district court should not order an audit of the agency's records for claims which would be time-barred under the relevant statute of limitations if that affirmative defense is pleaded by the defendants.

times advanced for the Hans v. Louisiana interpretation of the eleventh amendment. Neither logic nor consistency has been readily discernable, however, in the arcane jurisprudence of that constitutional provision, and we are unable to predict with any degree of confidence that a new day is dawning. Edelman v. Jordan, as we read it, prevents a federal court form requiring state officers to disgorge from the state treasury even unlawfully converted property, at least so long as the state pays for the disgorgement.

Alternatively, the class representatives urge that at the very least a federal court may order state disgorgement-- retroactive relief--when such relief will be at the expense of the federal government, not the state. Here, although absent an accounting we do not know the exact amounts involved,

it is clear that decreases in child support payments retained by the state will result in increases in federal AFDC payments in the next quarter, in an amount of about fifty percent of the decreases. A number of courts, subsequent to Edelman v. Jordan, have acknowledged the validity of this distinction for eleventh amendment purposes. See Fernandez v. Chardon, 681 F.2d 42, 59 (1st cir. 1982), aff'd sub nom., Chardon v. Fumero Soto, 462 U.S. 650 (1983); Wilson v. Lyng, 662 F.Supp. 1391, 1396 (N.D.N.C. 1987), rev'd on other grounds, 856 F.Supp. 630 (4th Cir. 1988); Cotton v. Mansour, 634 F.Supp. 1094, 1097-98 (E.D.Mich. 1986); Collins v. Marshall, 507 F.Supp. 83, 85 (W.D.Mo. 1981); Witter v. Pennsylvania Nat. Guard, 462 F.Supp. 299, 306 N.9 (E.D.Pa. 1978). The reasoning of these

cases is consistent with the result reached by this court prior to Edelman v. Jordan in Carter v. Butz, 479 F.2d 1084 (3d Cir.)., cert. denied, 414 U.S. 1103 (1973). We conclude that these authorities are sound. It is one thing for a state to insist that the eleventh amendment prevents retroactive relief which affects its fisc. It is quite another to insist that the state can confer an unwanted bonanza upon the United States by refusing to make an accounting and recover available funds from the federal treasury. Thus the court should have ordered retroactive relief against the DPW at least to the extent that DPW will be reimbursed by the United States.

V.

The judgment of liability in favor of the class will be affirmed. The court's decree is inadequate in the respects we have noted. The case will, therefore, be remanded for the entry of a decree providing for additional relief consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

MEMORANDUM AND ORDER

HANNUM, S.J. October 2nd, 1987

The plaintiffs Mary Bennett and Michaeline Forsythe instituted this class action challenging Pennsylvania's administration of the child support enforcement program established by Title IV-D of the Social Security Act, 42 U.S.C. §§651-667, and its implementing regulations.

The defendants are the Secretary and four other officials of the Pennsylvania Department of Public Welfare.

Presently before the Court are cross motions for summary judgment. The relief sought by the plaintiffs includes equitable relief and a declaratory judgment declaring that the defendants violate that portion of the Social Security Act which concerns the child support enforcement program established

by Title IV-D of the Social Security Act, 42 U.S.C. §§651-667 and its regulations by failing to comply with the federal requirements; that the defendant Secretary of the Department of Public Welfare violates the Taking Clause of the Fifth and Fourteenth Amendments to the United States Constitution by failing to make correct refunds of excess support and support payments collected after the termination of benefits which had been provided in accordance with the Aid to Families with Dependent Children Program (AFDC) and by failing to pay interest on improperly retained support; and that the Secretary violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide a periodic accounting of support

collected and assistance rendered to caretakers of children whose support is collected by the defendants and a notice of procedures for objecting to the amount or lack of a refund.

The Court notes that the plaintiffs' claims can be divided into three groups: (I) five claims arising under the federal statute and its regulations; (II) one claim under the Taking Clause; and (III) one claim under the Due Process Clause. The Court further observes that the defendants do not dispute the following facts as related by the plaintiffs in the statement of facts in support of plaintiffs' motion for summary judgment.

Pennsylvania receives federal funds pursuant to the AFDC program under Title IV-A of the Social Security Act, 42 U.S.C. §§601-615. In accordance with

Title IV-D of the Social Security Act, 42 U.S.C. §§651-667, Pennsylvania is responsible for having in effect a plan to secure child support for children who are AFDC recipients. 42 U.S.C. §654 and §602(a)(27). Pursuant to the Social Security Act, the Pennsylvania Department of Public Welfare (DPW) requires, as a condition of eligibility for AFDC benefits, that all applicants or recipients must assign to DPW all rights to support which any member of the assistance unit may have. 42 U.S.C. §602(a)(26). DPW has designated the Office of Fraud and Abuse Investigation and Recovery, formerly the Bureau of Claim Settlement, as the agency in Pennsylvania responsible for administering its plan under Title IV-D of the Social Security Act for enforcing child

support orders of AFDC recipients. The Office of Fraud and Abuse Investigation and Recovery administers the IV-D program in cooperation with the County Boards of Assistance, which administer the AFDC program, and through the Domestic Relations sections of the respective Pennsylvania Courts of Common Pleas, with which the Office maintains cooperative agreements.

As part of DPW's system for administering the IV-D program, DPW entered into an agreement, effective August 1, 1975, with the Domestic Relations Branch of the Family Court Division of the Philadelphia Court of Common Pleas (Philadelphia Family Court) which provides that the Domestic Relations Branch has primary reson-sibility for collecting child support payments in cases where an AFDC recipient has assigned support rights to

DPW. Thus, the Philadelphia Family Court functions as a local IV-D agency at the Philadelphia County level of government. Pursuant to the cooperative agreement, the Family Court Domestic Relations Branch collects and remits to DPW all child support payments in cases where an AFDC recipient has assigned support rights to DPW. The Social Security Act and its implementing regulations set forth the procedures according to which Pennsylvania is required to distribute the support monies remitted to DPW pursuant to assignments by AFDC recipients. 42 U.S.C. §§654(5), (11) and 657(b), (c); 45 C.F.R. §§232.30, 302.32, and 302.51. In addition, the Office of Child Support Enforcement of the Department of Health and Human Services has issued instructions to the states for the distribution of child support collections.

I. Violations of the federal statute and regulations

1. The failure to reassign support order payments promptly upon the termination of assistance.

When a family ceases receiving AFDC assistance, the assignment of child support terminates. 45 C.F.R. §302.51(f). DPW retains the right to attempt to collect arrearage payments for the amount of any unpaid support obligation that accrued under the assignment. 45 C.F.R. §302.51(f). In seventy-six of the seventy-eight cases for which the defendants produced or made available information concerning persons identified as recipients of support refunds during the first quarter of 1983, DPW took an average of between 164.9 and 178.95 days[1] from the date the

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[1]The plaintiffs calculate the average delay to be 178.95 days and the defendants calculate the delay to be

(FOOTNOTE CONTINUED ON NEXT PAGE)

AFDC case should have terminated to reassign the current support from DPW to the former recipient. In twenty-three cases identified by the defendants, DPW took an average of 301.67 days from the date the last AFDC check was paid to notify the Philadelphia Family Court that the assignment of support had terminated. These delays continue.

2. The failure to make prompt payment of support collected after assistance terminates.

Before October 1, 1984, whenever a family stopped receiving AFDC benefits, the IV-D agency had the option of continuing to collect current support payments from the absent parent for a period not

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(FOOTNOTE CONTINUED)

164.9 days. The Court did not check this calculation or the others mentioned in this Memorandum. The other calculations are undisputed.

to exceed three months from the month following the month in which the family stopped receiving AFDC benefits. 42 U.S.C. §657(c)(1); 45 C.F.R. §302.51(e)(1)(1984). Except for such amounts that the State retains as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed, support amounts so collected were to be paid to the family. 42 U.S.C. §657(c)(1); 45 C.F.R. §302.51(e)(1)(1984). Effective October 1, 1984, the IV-D agency is required to continue to collect support for the three month period. 42 U.S.C. §657(c)(1) (as amended October 1, 1984); 45 C.F.R. §302.51(e)(1)(1985). DPW complies with this requirement by having the Family Court Domestic Relations Branch collect

support. All support payments so collected must be paid to the family. 42 U.S.C. §657(c)(1); 45 C.F.R. §302.51(e)(1). Nevertheless, the Philadelphia Family Court routinely collects and remits to DPW current support paid for persons whose assistance terminated. In seventy-six of the seventy-eight cases for which the defendants produced or made available information concerning persons identified as recipients of support refunds during the first quarter of 1983, the Philadelphia Family Court collected and remitted to DPW current support for persons whose assistance had terminated. In three of those cases DPW never refunded the support to the former recipient. With respect to the other seventy-three cases, DPW took an average

of 279.99 days from the date support was first collected after the assistance case should have been closed to authorize a refund, and an additional four to eight weeks to send the refund to the beneficiary.

In some cases, the Philadelphia Family Court sent former AFDC recipients a form letter stating that it would take eight weeks from the date the Family Court requested a refund for the recipient to receive the refund. The form letter also advised the recipient not to call the Family Court accounting unit concerning the refund until nine weeks had expired. In the seventy-three cases in which the defendants refunded support remitted to DPW after the assistance case closed during the first quarter of 1983, the amount of the refunds ranged from $25.00 to $1874.66 and averaged $370.03. Former recipients

were denied the use of these monies for their children until the refunds were made. In twenty-three cases identified by the defendants, the amount of the support refunds ranged from $1001.00 to $4467.40 and averaged $1789.93; DPW took an average of 397.22 days after the last AFDC check was paid to make the refund.

In the case of Michaeline Forsythe, a named plaintiff, the Philadelphia Family Court continued to collect support monies payable to Ms. Forsythe on behalf of her children after her AFDC grant terminated in December 1978 and paid these monies to DPW which in turn retained them even though these monies constituted the only means of support for the children during a period when Ms. Forsythe had no other source of income. The IV-D agency never notified Ms. Forsythe that it would continue to

collect support after her assistance terminated. Despite Ms. Forsythe's repeated requests, the defendants failed to pay the support monies collected by the Family Court and remitted to DPW. Consequently, Ms. Forsythe was forced to reapply for AFDC benefits because she did not have access to the only other means of support for her children. Ms. Forsythe did not receive a refund of child support payments until four months after her assistance had terminated. In addition to remitting support to DPW rather than to the caretaker of the child after AFDC benefits terminate, the Philadelphia Family Court frequently holds support payments collected after assistance terminates for some period of time before releasing the payments to the caretaker on behalf of the child. This occurred in over half of the cases

of individuals identified as recipients of support refunds during the first quarter of 1983.

According to an audit by the Office of Child Support Enforcement, the Philadelphia Family Court Domestic Relations Branch Bureau of Accounts holds substantial sums of support collections. At the time of the audit, there were 343 AFDC support accounts with money on hold; ninety-six of those had been on hold for more than a year.

3. The failure to make prompt payment of excess support collected.

DPW is required to pay to AFDC recipients all current support collections which exceed the AFDC grant but which do not exceed the court order. 42 U.S.C. §657(b)(3); 45 C.F.R. 302.32(e), 302.51(b)(3). DPW is also required to

pay to AFDC recipients support amounts collected in excess of the court order if there are no past assistance payments made by DPW which have not been reimbursed. 42 U.S.C. §657(b)(4); 45 C.F.R. §302.51(b)(5). Federal law requires that DPW redetermine an AFDC recipients' continued eligibility no later than the second month after the month in which the child support was collected. If the support collected exceeds the AFDC grant and renders the recipient ineligible, DPW must take steps to terminate the AFDC grant and must pay the excess support to the recipient on the same date that the recipient would have received the AFDC benefit if the grant had not been terminated. 45 C.F.R §§232.20(a)(1), 302.32(b). DPW, however, does not maintain records to enable the defendants

to identify people whose AFDC benefits were terminated because of excess income from child support. DPW collected excess support during the period when AFDC benefits were paid in eleven of the seventy-eight cases for which the defendants produced or made available information concerning persons identified as recipients of support refunds during the first quarter of 1983. In none of the eleven cases did DPW take prompt steps to terminate the AFDC grant when the excess support was collected and in none of the cases did DPW pay the excess support to the recipient on the same date that the recipient would have received the AFDC benefit if the grant had not been terminated. In four of the cases, the excess support was never paid to the former recipient. In the other seven cases, the excess support was paid an

average of 134.80 days after the date the next AFDC check would have been paid if the AFDC case had not been closed. Audits performed by the Office of Child Support Enforcement of Pennsylvania's IV-D Program found that the State's distribution system did not provide for making excess payments to the family.

4. The improper collection of support for more than three months after assistance terminates without the recipient's authorization.

The IV-D agency is required to collect support payments after assistance terminates for a period not to exceed three months from the month following the month in which such family ceased to receive assistance. At the end of the three month period, the IV-D agency may continue to collect support only if it has been authorized to do so by the former recipient. 42 U.S.C. §657(c); 45 C.F.R. §302.51(e)(3).

DPW reported to the Department of Health and Human Services that its IV-D agency makes no collections after assistance terminates.[2] The Philadelphia Family Court, however, continued to collect and remit to DPW current support for more than five months after the month of the last AFDC check for the child in twenty-two of the seventy-eight cases for which the defendants produced or made available information concerning persons identified as recipients of support refunds during the first quarter of 1983. In ten of the cases, the Philadelphia Family Court collected and remitted to DPW current support for twelve or more months after the month of

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[2]The information appears in the Quarterly Report of Collections dated September 30, 1984, December 30, 1984, March 30, 1985, and June 30, 1985.

the last AFDC check for the child. In one case, the Philadelphia Family Court collected and remitted support for fifty-six months after the month of the last AFDC check for the child. In six cases cited by the plaintiffs, the Philadelphia Family Court collected and remitted to DPW current support for more than five months after the month of the last AFDC check for the child. In none of these cases did DPW or the Philadelphia Family Court seek or obtain the former recipient's authorization to collect support for more than three months after the month in which the recipient received the last assistance check.

5. The failure to notify AFDC recipients that the Philadelphia Family Court will continue to collect support after AFDC terminates.

In accordance with 45 C.F.R. §302.32(b), the IV-D agency notifies the family if the agency will continue to provide services after assistance terminates. Without notifying the family that it will do so, DPW routinely collects support after AFDC benefits end and despite the notification requirement.

With respect to the preceding claims, the plaintiffs do not contend that the defendants' regulations or procedures violate federal law. Rather, they argue that the defendants' misapplication of the procedures and regulations constitutes a violation of federal law. The defendants assert that "they have established and followed policies and procedures which are designed to comply with the requirements of the law" and that their policies and

procedures do so comply. They admit, however, that "during any given three-month period, there will likely be eighty cases where someone makes a mistake," and believe that "in considering the rights of the class, it is their [defendants'] general policies and procedures, and not isolated errors and omissions, that control." The Court believes that it is inappropriate for the defendants to suggest that their policies and procedures control when they fail to follow them.

In the Court's view, there is no genuine issue as to any material fact. The Court further believes that the defendants' failure to reassign court orders upon termination of AFDC benefits, failure to insure that the Philadelphia Family Court makes prompt payment of support collected after assistance terminates, failure to make

prompt payment of excess support collected, improper collection of support for more than three months after assistance terminates without the recipient's authorization, and failure to notify AFDC recipients that the Philadelphia Family Court will continue to collect support after AFDC terminates show that the defendants do not comply with the procedures as provided in 42 U.S.C. §§602(a)(27); 654(5)(11), and 657(b),(c), and 45 C.F.R. §§232.20(a)(1); 302.32(b); and 302.51(e),(f). The misapplication of the law and regulations constitutes a violation of federal law. The Court will not enter judgment for the plaintiffs unless and until it receives additional briefs from counsel concerning an appropriate remedy with respect to defendants' noncompliance with federal requirements.

II. Taking Clause Claim

Miscalculation of refunds

Out of seventy-eight cases for which the defendants produced or made available information concerning persons identified as recipients of support refunds during the first quarter of 1983, there were forty-six cases in which DPW miscalculated the amount of the refund, in addition to the four cases where DPW never paid the excess support collected. In almost all of these cases, DPW retained monies owed to the children on whose behalf the support was paid; in a few instances, DPW directed the refund to the wrong person. In all of these forty-six cases, the children never received the support. Refund amounts in the forty-six cases in which erroneous refunds were paid range from $10.00 to $1746.60; the average error is $195.57.

The plaintiffs contend that DPW's failure to make correct refunds and failure to pay interest on improperly retained support constitutes a taking of the plaintiffs' property in violation of the Fifth and Fourteenth Amendments.[3] The plaintiffs further contend that DPW's future taking of plaintiffs' property should be enjoined, that DPW should be ordered to correct the refunds made to all class members, and that DPW should be ordered to pay interest to all class members for the period during which DPW improperly retained their support.

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[3]The Fifth Amendment of the Constitution pertinently provides that "nor shall private property be taken for public use, without just compensation." This prohibition applies against the State through the Fourteenth Amendment. Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980).

The defendants assert that the plaintiffs' count of forty-six cases in which DPW miscalculated refunds is inflated. The defendants also state that

> a relative handful of errors cannot justify class-wide injunctive relief, particularly on an issue such as this. Is the Secretary of Public Welfare to be held in contempt every time one of his clerks makes a mistake in arithmetic?

Without addressing the plaintiffs' claims any further, the defendants contend only that the injunctive relief requested by the plaintiffs, that is the payment of interest, is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974). The defendants fail to discuss the plaintiffs' request that DPW correct the refunds made to plaintiffs.

Based on the facts set forth by the plaintiffs and the defendants' admission that as the result of mistakes, the defendants held onto the plaintiffs' property, the Court finds that the defendants took the plaintiffs' property. The Court concludes that the taking, for which the plaintiffs were not compensated, constitutes a violation of the Fifth and Fourteenth Amendments.

While the Eleventh Amendment bars the payment of interest to plaintiffs,[4] it certainly does not preclude the payment to plaintiffs of

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[4]See Edelman v. Jordan, 415 U.S. 651 (1974). Contrary to the plaintiffs' belief, Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984), does not support their position that they are entitled to receive interest. In Kirby Forest, the Supreme Court refers to three statutory methods employed by the United States when it appropriates private land for a public purpose. The Supreme Court's reference to the payment of interest, however, is limited to cases involving the taking of land. Id. at 10-11. See 40 U.S.C. §258a.

their money which the defendants withheld improperly. With respect to the refunds of support payments inadvertently withheld by the defendants, the Court will direct the parties to submit briefs in which they inform the Court of outstanding refund payments and procedures which, if adopted, would improve the defendants' system.

III. Due Process Clause claim

Absence of accounting for recipients whose support is collected by DPW.

DPW does not provide periodic statements to recipients of AFDC showing the amount of support collected by DPW and the amount of public assistance expended for the individuals for whom the support is paid. Consequently, recipients do not know whether the support collected exceeds the public assistance for the child or children for

whom the support is collected and whether DPW is retaining support to which the child or children are legally entitled. DPW does not routinely provide former recipients who receive refunds of excess support collected with an explanation of how it was determined that excess support was paid or how the refund was calculated so that former recipients can determine whether the amount of the refund is correct.

The Philadelphia Family Court also does not provide any sort of periodic accounting statement to beneficiaries of child support orders. If an individual who is not represented by an attorney requests information from Family Court concerning child support payments, she will be given a "statement of account" which gives only very limited

information, and is insufficient to determine whether or not child support is being or has been correctly and promptly distributed, and whether or not the individual is entitled to a refund of child support from DPW. An attorney can request a computer print-out from Family Court. The print-outs provide significantly more information than a statement of account, but are confusing and difficult to read, and do not provide sufficient information to determine whether or not support has been correctly distributed.

The plaintiffs contend that under the Fourteenth Amendment Due Process Clause, they are entitled to receive a monthly acccounting, which includes a statement of the amount of support collected, an explanation of how a refund was calculated, an explanation

of the procedures for asserting a refund claim, and a statement of the amount of public assistance received by the family.

The defendants concede that Title IV-D of the Social Security Act now requires states, at least annually, to provide recipients with an annual accounting of support collected in their behalf. 42 U.S.C. §654(5); 45 C.F.R. §302.54. The defendants further submit that as a part of a settlement in another suit, Shenigo v. Cohen, No. 85-7221 (E.D. Pa.), DPW agreed to provide recipients with monthly accountings of the support collected in their behalf and that consequently, part of the plaintiffs' request is moot.

In reply, the plaintiffs assert that many members of the plaintiff class will not receive notices because the plaintiff class includes people who do

not still receive assistance, yet are nonetheless having their support diverted to DPW. The notice provided in accordance with Title IV-D of the Social Security Act, and the Shenigo case is sent only to those who receive assistance. The plaintiffs contend that every individual whose support is sent to DPW is entitled to an accounting under the Due Process Clause.

The Court believes that the evidence shows, and the defendants admit, that the plaintiffs have been deprived of their property when their refunds were calculated incorrectly or never sent to them. The accounting contemplated by the plaintiffs would greatly benefit the people for whom the system was set up. In addition, by providing information as to how a refund

was calculated and regarding the procedure for asserting a refund, the defendants would remedy situations in which members of the class were deprived of their money. It is unnecessary, however, for the defendants to Provide information in the monthly statement concerning the amount of assistance received by the family. Recipients should be able to keep a record of how much assistance they have received.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY BENNETT and MICHAELINE FORSYTHE, on behalf of themselves and all others similarly situated	:	CIVIL ACTION
v.	:	
JOHN F. WHITE, JR., Secretary of the Pennsylvania Department of Public Welfare; Director of the Office of Program Accountability of the Pennsylvania Department of Public Welfare; Director of the Claims Settlement Division of the Pennsylvania Department of Public Welfare; WILLIAM SLOM, individually and as Agent-in-Charge of the Claims Settlement Area Office for the Southeastern Region of the Pennsylvania Department of Public Welfare; ROBERT J. HENRY, individually and as Support Director of Claims Settlement Area Office for the Southeastern Region of the Pennsylvania Department of Public Welfare	:	NO. 79-1764

ORDER

AND NOW, this 2nd day of October, 1987, upon consideration of the plaintiffs' motion for summary judgment (Docket Entry No. 53), in which the plaintiffs seek various forms of equitable relief including a declaratory judgment declaring that the defendants' procedures with respect to the child support enforcement program established by Title IV-D of the Social Security Act, 42 U.S.C. §§651-667 and its regulations fail to comply with the federal requirements, that the defendant Secretary of the Department of Public Welfare (Secretary) violates the taking clause of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 by failing to make correct refunds of excess support and support payments collected after the termination of benefits which had been provided in

accordance with the Aid to Families with Dependent Children Program and by failing to pay interest on improperly retained support, and that the Secretary violates 42 U.S.C. §1983, the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide a periodic accounting of support collected and assistance rendered to caretakers of children whose support is collected by the defendants and a notice of procedures for objecting to the amount or lack of a refund; the defendants' motion for summary judgment (Docket Entry No. 58): the declaration of Joel M. Ressler (Docket Entry No. 59); the defendants' memorandum in opposition to the plaintiffs' motion for summary judgment and in support of their cross motion for summary judgment (Docket Entry No. 60); the plaintiffs' response to the defendants' cross motion for summary

judgment (Docket Entry No. 61); and the foregoing Memorandum, it is hereby ORDERED that:

Within thirty (30) days of the entry of this Order, counsel will submit to the Court a joint proposal that addresses the following: a remedy with respect to the defendants' mishandling of cases, a list of outstanding refund payments, and procedures which, if adopted, would improve the defendants' system. Counsel will also submit a joint proposal concerning the language of a monthly statement that contains information regarding support collected, the manner in which refunds are calculated, and procedures for asserting a refund claim.

_____

S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY BENNETT, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 79-1764.
JOHN F. WHITE, JR., substituted pursuant to F.R.C.P. 25(d)(1), et al., Defendants.	:	

ORDER

AND NOW, 19th day of February, 1988, after review of the parties' proposed remedies to correct defendants' violations of federal law as found by the Court in its Memorandum and Order entered on October 5, 1987, the Court hereby ORDERS the following:

I. PROCEDURES TO ENSURE REASSIGNMENT OF SUPPORT ORDERS AFTER ASSISTANCE TERMINATES.

1. The defendants ("DPW") and the Philadelphia Family Court are at present developing and testing a system to reassign support orders to the family automatically when the cash assistance case for an entire family closes. The defendants shall continue this effort, which is described below.

2. DPW produces on a daily basis a computer tape of all cases in Philadelphia in which assistance is being terminated. Case closings include all cases where a check was issued for the most recent payment date for the family and where a check will not be issued for the next date that the family would have received a check if the case had not closed. The computer tape of

case closings is produced at least two working days in advance of the next payment date.

3. The computer tape of case closings will eventually be transmitted electronically from Harrisburg to the Philadelphia Family Court on the date that it is produced. However, until equipment is installed for electronic transmission, DPW mails the tape to the Philadelphia Family Court on a daily basis.

4. On receiving the computer tape, the Philadelphia Family Court performs a computer match of the tape of case closings with all cases for which the Philadelphia Family Court has a record that a support order was established. Philadelphia Family Court performs the match the same day that it receives the case closings tape from

DPW. The match is performed by matching cash assistance case numbers on the case closing tape with cash assistance case numbers for caretakers in the Philadelphia Family Court's records.

5. Whenever a IV-A case closing number matches a Philadelphia Family Court caretaker cash assistance number, the Philadelphia Family Court reassigns the support back to the former recipient on the same day, effective on the date that the family would have received an assistance check if the case had not closed.

6. DPW and/or the Philadelphia Family Court will test the accuracy of the proposed computer based reassignment system for case closings and will provide written reports to plaintiffs' counsel, once each quarter for one year, setting forth what tests were performed and the results of those tests.

II. PROCEDURES TO ENABLE FORMER RECIPIENTS TO ASSIST DPW'S EFFORTS TO MAKE TIMELY REASSIGNMENTS OF SUPPORT ORDERS

7. It is the responsibility of DPW to reassign support orders on behalf of former recipients immediately upon termination of a person's AFDC benefits, and the procedures set forth in §I are designed to fulfill that responsibility. However, in order to minimize the possibility of error, the following procedures are designed to enable former recipients to assist DPW's efforts to make timely reassignments of support orders when assistance terminates or is suspended or an individual is removed from the grant.

8. Every Form 162-A, 162-C or L/IN which is sent to a recipient suspending or terminating an entire cash

assistance grant or suspending or removing an individual from the cash assistance grant shall have attached a notice advising the recipient of support reassignment rights.

9. DPW shall arrange for support reassignment personnel to be employed by DPW to respond to recipients' questions and requests for reassignment.

10. The support reassignment personnel shall be assigned a telephone number or numbers which shall not be used by other employees or for other purposes and which shall be included on the notice.

11. The support reassignment personnel shall have access to a IV-A computer terminal from which they can access information on case closings and removals of persons from cash assistance.

12. If an individual, either in person or by telephone, requests reassignment of a support order; the support reassignment personnel shall check the IV-A computer terminal to verify that the cash assistance case has been closed. Upon verifying that the cash assistance case has closed, the support reassignment personnel shall use their best efforts to arrange for the Philadelphia Family Court to reassign the support order.

13. Support reassignment personnel may require the person making the support reassignment request to provide the caretaker's name and AFDC case number. Support reassignment personnel may also require the person making the support reassignment request to provide the names and social security

numbers of any person being removed from the grant if the entire case has not closed.

III. PROCEDURES TO ENSURE REFUNDS OF SUPPORT COLLECTED AFTFR THE ASSIGNMENT TERMINATES OR OF EXCESS SUPPORT COLLECTED DURING THE PERIOD OF THE ASSIGNMENT

14. DPW shall use its best efforts to ensure that whenever the Philadelphia Family Court performs a computer match of a tape of case closings as described in ¶ 4, the Philadelphia Family Court generates a list of all cases in which the Family Court processing date is later than the effective date of reassignment, and that the Philadelphia Family Court sends this list to DPW's Philadelphia Area Office of Fraud and Abuse the same day it is generated.

15. DPW shall examine each case in the list generated by the Philadelphia Family Court as described in ¶ 14, and shall determine whether a refund of support is owed. If a refund is owed DPW shall compute the amount and mail the refund no later than 15 working days after the date that the list was received from the Philadelphia Family Court.

16. A support refund request may also be initiated by an individual or the individual's representative and may be oral or written. The request may be addressed to DPW's Area Office of Fraud and Abuse in Philadelphia.

17. Whenever the DPW Area Office receives an oral or written support refund request or otherwise determines that an individual may be entitled to a refund, it shall submit a

written Request for Refund of Support, Exhibit C, to DPW's Office of Fraud and Abuse in Harrisburg no later than five working days following the day of the oral or written request or five working days following the day of the determination that an individual may be entitled to a refund, whichever is earlier.

18. A copy of the written Request for Refund of Support shall be mailed to the individual on whose behalf the refund is requested together with a Notice of Support Refund Request, Exhibit D, on the same day the request is submitted to DPW's Office of Fraud and Abuse.

19. In determining whether a refund is owed and the amount of the refund, DPW shall follow the Rules for Processing Support Refunds set forth in Exhibit E.

20. DPW shall process and, if appropriate, pay support refunds no later than 15 working days after the date that an oral or written support refund request was received by the DPW Area Office.

21. The support refund check shall be accompanied by an explanation of how the support refund was calculated together with notice of appeal rights.

22. If DPW determines that the individual is not entitled to a support refund, DPW shall mail the individual a notice containing an explanation of the reason for the denial together with notice of appeal rights.

IV. CORRECTION OF MISCALCULATED SUPPORT REFUNDS

23. DPW shall send each of the 46 persons referred to in Plaintiffs' Motion for Summary Judgment, ¶44, as having received incorrect refunds a

notice informing the individual that the previously paid refund was incorrect and the procedure for requesting correction. Plaintiffs' counsel will supply defendants' counsel with a list of the names of the 46 persons, the amount allegedly owed and the method of calculating it, and an address if available no later than 10 working days after entry of this Order.

24. If the individual has an active cash assistance case, the notice shall be sent to the individual at the address recorded in DPW's record of active cash assistance cases. If the individual does not have an active cash assistance case, the notice shall be sent to the individual's address provided by plaintiffs' counsel, the individual's address listed in the Philadelphia Family Court's computer,

and the most recent address for the individual recorded in DPW's record of cash assistance cases.

V. ACCOUNTING OF SUPPORT COLLECTED

25. DPW and plaintiffs counsel will use their best efforts to modify the notice currently sent to some cash assistance recipients in accordance with Shenigo v. Cohen, CA. No. 85-7221 (E.D. Pa.), so as to include appropriate information on possible entitlements to refunds and the procedure for requesting refunds, in accordance with Exhibit E; and to send such notices to all persons whose support collections are sent to DPW. Plaintiffs' counsel will be responsible for securing written agreement from counsel for plaintiffs in Shenigo for these modifications.

VI. REPORTS

26. For one year, DPW shall on a quarterly basis produce and provide to plaintiff's counsel a report showing, for each month during the previous quarter, (a) the number of cases where a support order was reassigned to an individual because the cash assistance case closed, (b) the number of refunds made, (c) the amount of each refund.

VII. INSTRUCTIONS AND TRAINING

A. Office of Fraud and Abuse Staff

27. DPW shall issue written instructions concerning the procedures for reassignment of support and requesting, computing, and processing support refunds, to all relevant Office of Fraud and Abuse staff. A copy of these instructions shall be provided to plaintiffs' counsel on the date of issuance.

28. DPW shall provide training to all relevant Office of Fraud and Abuse staff concerning the procedures for reassignment of support and requesting, computing and processing refunds of support. DPW shall provide counsel for plaintiffs with a copy of all training materials.

B. Family Court Personnel

29. DPW shall use its best efforts to ensure that written instructions are distributed to all personnel of the Philadelphia Family Court involved in reassigning support orders and requesting refunds of support. A copy of the written instructions shall be provided to Plaintiffs' counsel on the date of issuance.

30. DPW shall use its best efforts to ensure that training is provided to all Family Court personnel involved in reassigning support orders and requesting refunds of support concerning the procedures for reassigning support orders and requesting refunds.

31. DPW shall provide plaintiffs' counsel with a copy of all training materials.

VIII. NOTICES

32. The form notices attached to this Order are intended as models. Plaintiffs counsel and DPW shall use their best efforts to modify the form and content of the notices, through use of varying type faces, language choices and other means, to improve readability

and to maximize the ability of defendants to generate notices using computers, and to resolve unanticipated difficulties. DPW shall translate all notices into Spanish.

IX. MISCELLANEOUS

33. Except as otherwise provided in this Order, the provisions of this Order are effective thirty days from entry of the Order.

34. In the event that there are material changes in the governing federal statue or regulations, nothing in this Order shall be construed so as to prevent DPW from complying with them, or as imposing on DPW more stringent or restrictive requirements then the statute or regulations.

35. The Court recognizes that the DPW has received federal funding for the design of a single statewide computer

system which will provide for automated interfacing between the IV-A and IV-D programs, and which will also be integrated with the automated information system planned for the states courts. The target date for implementing this system, if further federal approvals are forthcoming, is 1990. Nothing in this Order forbids the defendants from integrating any of the functions provided for in this Order into such a system.

BY THE COURT

HANNUM, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY BENNETT and MICHAELINE FORSYTHE, on behalf of themselves and all others similarly situated	:	
v.	:	
HELEN O' BANNON, Secretary of the Pennsylvania Department of Public Welfare; JAMES R. ADAMS, Director of the Office of Program Accountability of the Pennsylvania Department of Public Welfare; CLYDE BLACK, Director of the Claims Settlement Division of the Pennsylvania Department of Public Welfare; WILLIAM SLOM, Individually and as Agent-in-Charge of the Claims Settlement Area Office for the Southeastern Region of the Pennsylvania Department of Public Welfare; ROBERT J. HENRY, Individually and as Support Director of Claims Settlement Area Office for the Southeastern Region of the Pennsylvania Department of Public Welfare	:	NO. 79-1764

O R D E R

AND NOW, this 18th day of October, 1979, it is ORDERED that Plaintiffs' Motion For Class Determination is GRANTED pursuant to Rule 23(a) and Rule 23(b) of the Federal Rules of Civil Procedure, and the following class is certified:

All present or former recipients of public assistance, residing in Philadelphia, who assigned their rights and their childrens' rights to support to the Department of Public Welfare (DPW) and whose support money is actually being collected by DPW.

It is FURTHER ORDERED that the Order and the class certified herein are subject to alteration or amendment pursuant to the provisions of Federal Rules of Civil Procedure 23(c)(1) and (4)(B), as the interests of justice may require.

JOHN B. HANNUM (signed)

J.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 30, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered February 22, 1988, be, and the same is hereby affirmed insofar as the judgment of liability in favor of the class and cause is remanded to the said District Court for entry of a decree provising for additional relief consistent with the opinion of this Court. Costs taxed against the appellee-cross-appellants.

ATTEST:

Sally Mrvos s/s

Clerk

January 13, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1204 and 88-1267

MARY BENNETT and MICHAELINE FORSYTHE,
on behalf of themselves and all others
similarly situated,
Appellants in 88-1204

v.

JOHN F. WHITE, JR., etc., et al.,
Appellants in 88-1267

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges, and FARNAN, * District Judge,

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS (Signed)
Chief Judge

Dated: Feb. 10 1989

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*As to panel rehearing only.

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1851

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN F. WHITE, JR., et al.,

Petitioners,

v.

MARY BENNETT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DEBORAH HARRIS
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Community Legal Services, Inc.
3638 North Broad Street
Philadelphia, Pa. 19140
(215) 227-2400

Counsel for Respondents

June 14, 1989

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the liability finding of the two lower courts merely because of a harmless misstatement by the Court of Appeals that the defendants had not complied with discovery orders?

2. Whether the Court of Appeals' requirement that defendants provide a one-time accounting to class members whose child support payments are illegally held by defendants violates the Eleventh Amendment where the accounting is necessary to prevent ongoing violations of plaintiffs' constitutional rights to procedural due process?

3. Whether the relief ordered by the Court of Appeals is barred by the Eleventh Amendment where the Court of Appeals expressly did not require any payment of state funds?

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No. 88-1851

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

JOHN F. WHITE, JR., et al.,

Petitioners,

v.

MARY BENNETT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Mary Bennett and Michaeline Forsythe, on behalf of themselves and all other similarly situated persons, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision

of the United States Court of Appeals for the Third Circuit. That decision is reported at 865 F. 2d 1395 (3d. Cir. 1989). The liability decision of the United States District Court for the Eastern District of Pennsylvania, which the Court of Appeals affirmed, is reported at 671 F. Supp. 343 (E.D. Pa. 1987). The District Court's remedial order, which the Court of Appeals affirmed in part and reversed in part, is set forth in the appendix to petitioners' brief at 98a.

STATEMENT OF THE CASE

This case concerns child support payments that belong to the children's custodial parents. Both the District Court and the Court of Appeals found that officials of the Pennsylvania Department of Public Welfare were routinely violating class plaintiffs'[1] rights by failing to reassign child support to the custodial parents when their public assistance benefits terminated and by keeping child support payments to which the state never had any legitimate claim. The facts found by the lower courts are not in dispute. 865 F. 2d at 1402; Pet. App. at 21a; 671 F. Supp at 345, Pet. App. at 64a. Indeed, defendants submitted no evidence to refute plaintiffs' proof.

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[1] The class consists of present or former recipients of public assistance, residing in Philadelphia, whose child support is or was collected by defendants. 865 F.2d at 1398, Pet. App. at 3a.

The lower courts' findings were based in part on a set of 78 cases of persons in Philadelphia who received refunds of illegally collected support during the first quarter of 1983. Defendants admitted that in every one of these cases they violated one or more of the federal requirements governing the collection and distribution of child support paid on behalf of present or former AFDC recipients. C.A. App. III, 323-480, IV, 483-88.[2] Petitioners do not dispute the District Court's finding that they took an average of five and one-half months to reassign support to former recipients after the former recipients stopped receiving public assistance, 671 F. Supp. at 345-46, Pet. App. at 68a-69a, in violation of federal law which requires immediate

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[2] "C.A. App." designates the appendix filed in the Court of Appeals. Roman numerals refer to volume numbers; arabic numerals refer to page numbers.

reassignment. See 42 U.S.C. § 602(a)(26); 42 U.S.C. §§ 654(5); 45 C.F.R. § 302.51(f). Nor do petitioners dispute the finding that they took an average of more than nine months to authorize a refund of the illegally collected support and an additional one to two months to make payment. 671 F. Supp. at 346, Pet. App. at 72a. These delays denied former recipients the child support on which they were depending for their children's needs. 671 F. Supp. at 346-47, Pet. App. at 72a-74a.

Petitioners also do not dispute the lower courts' finding that in 46 of the 78 cases defendants refunded less than the amount owed, an error rate of almost 60 percent. 865 F.2d at 1401, Pet. App. at 24a; 671 F. Supp. at 348-49, Pet. App. at 34a.

Despite this pattern of abuse, petitioners asserted below, and continue to assert in this Court, that the 78 cases are

not representative. According to petitioners, the 78 cases constitute only a small percentage of the relevant universe and therefore do not establish a sufficient degree of violation to warrant injunctive relief.[3]

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[3] Petitioners suggest that the relevant universe consists of the 139,000 open child support cases during a different quarter. Pet. at 13. This is absurd. In fact, the universe consists of approximately 200 cases. The 139,000 child support cases count every absent parent for each welfare case, whether or not there is a support order, and whether or not child support is collected. C.A. App. VI, 824. As petitioners acknowledge, support was actually collected in only 10,000 of those cases, or about 7%. Pet. at 13. Petitioners neglect to point out that only 3,000 of the open child support cases closed during the quarter. C.A. App. VI, 822. Assuming that support was actually collected in 7% of these cases, there were a little over 200 cases that closed during the quarter in which there was a child support collection. Because the relevant universe of cases that closed in which child support was actually collected consists of approximately 200 cases, the 78 cases from the first quarter of 1983 produced by defendants evidently constitute a very large sample of the total.

This argument was rejected by both of the lower courts, in part because defendants failed to provide the data necessary to establish a statistically valid sample. As the Court of Appeals pointed out, defendants claimed they could not respond to discovery requests concerning AFDC recipients whose benefits terminated when child support payments made them ineligible for public assistance. Defendants also did not comply with federal requirements that they report on a quarterly basis the number of AFDC cases that closed in which child support was collected. Because defendants did not supply the necessary data for a fully representative cross-section, the Court of Appeals rejected their argument that the set of 78 cases was not sufficiently representative. 865 F.2d at 1401; Pet. App. at 23a-24a; see C.A. App. II, 299-301, 309; VI, 822.

Moreover, petitioners concede that the 78 cases are "fairly representative" of cases in which they make a refund after they have erroneously collected a former recipient's child support. Pet. at 16. The error rate in this undeniably valid sample of refunds was almost 60%. Petitioners do not explain why this is "a minuscule percentage of cases." Pet. at 18.

Petitioners' claims of compliance with federal law rely solely on two federal audits. However, neither federal audit looked at a statistical sample of child support cases in Philadelphia and neither audit addressed whether former recipients were receiving the support that belonged to them.[4] Indeed, as the Court of Appeals and

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[4] One of the two audits to which petitioners refer examined only 98 cases statewide. C.A. App. V, 751. The other did not look at a single case in Philadelphia. C.A. App. V, 672-73.

the District Court pointed out, federal audits have found that the Philadelphia Family Court, which is under contract with defendants to collect and distribute child support for AFDC recipients in Philadelphia, holds substantial sums on account for long periods of time instead of distributing them promptly. 865 F.2d at 1402, Pet. App. at 24a; 671 F. Supp. at 347, Pet. App. at 75a; see C.A. App. V, 650, 751.

As the lower courts found, the class members were not in a position to initiate claims for the child support which defendants were illegally holding because the class members had no way of knowing that defendants were collecting and keeping their property. An application for AFDC benefits operates as an automatic assignment of child support rights to the state, whether or not there is a support order and whether or not any child support

is being paid at the time of the assignment. 42 U.S.C. § 602(a)(26)(A); 45 C.F.R. § 232.11. Unless the state provides notice of child support collections, an AFDC recipient has no way of knowing whether and how much support the absent parent is paying, or whether the support that is paid exceeds the children's public assistance. When AFDC benefits end, the former recipient has no way of knowing whether any support is being paid, or whether the state is continuing to collect it even though the assignment has legally terminated. 671 F. Supp. at 349-50, Pet. App. at 88a-90a; C.A. App. at 793-94. The lower courts found that defendants did not begin sending even rudimentary notice of support collections until 1986, and further found that the notice did not contain sufficient information for class members to determine whether they had claims for child support that was being held by the state.

865 F.2d at 1402, Pet. App. at 27a-28a; 671 F. Supp. at 350, Pet. App. at 91a-93a.

Based on this record, both of the lower courts held that defendants violated the federal statute and regulations governing the states' collection and distribution of child support. The lower courts also held that defendants' failure to refund all of the support that they had illegally collected worked an uncompensated taking of plaintiffs' property. And, because defendants never provided any notice of the child support that they had collected and illegally retained, the lower courts held that defendants deprived plaintiffs of their property without procedural due process. 865 F.2d at 1401-02, 1404-05, Pet. App. at 21a-28a, 38a-43a; 671 F. Supp. at 348-50, Pet. App. at 82a-83a, 87a, 92a-93a.

To remedy the procedural due process violation, the Court of Appeals held that

defendants should have been ordered to provide "an accounting notice which includes the agency's calculations of support payments and AFDC assistance payments against which they are offset." 865 F.2d at 1405, Pet. App. 42a-43a. Defendants are mandated by federal law to perform these calculations on a monthly basis to determine whether the family is entitled to any of the support collected on its behalf. See 42 U.S.C. § 657; 45 C.F.R. §§ 232.20(b)(1), 302.51(b),(f). The Court of Appeals therefore concluded that requiring defendants to provide plaintiffs with the calculations would significantly reduce the risk of erroneous deprivation of plaintiffs' property without unreasonably increasing the burden on defendants. 865 F.2d at 1404-05, Pet. App. at 40a-43a.

Because class members whose child support has already been collected by defendants received no notice whatsoever

that defendants were collecting their property and no notice from which they could determine whether a refund is owed, the Court of Appeals held that defendants were required to audit their records to identify and send notice to class members whose moneys are being illegally retained by defendants. The Court of Appeals also ordered defendants to refund the child support that they are illegally keeping, but only "to the extent that [defendants] will be reimbursed by the United States." 865 F.2d at 1405, 1407-08, Pet. App. at 42a, 55a-59a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' HARMLESS MISSTATEMENT THAT DEFENDANTS DID NOT COMPLY WITH DISCOVERY ORDERS DOES NOT MERIT REVIEW.

Petitioners seek review on the ground that the "Court of Appeals decided the liability part of this case by sua sponte imposing discovery sanctions." Pet. at 23. In fact, the Court of Appeals never imposed any discovery sanctions, although it did mistakenly refer to discovery orders. Review should be denied because the Court of Appeals did not impose discovery sanctions, because its minor imprecision with respect to the existence of discovery orders does not affect the correctness of the decision below, and because, in any event, the Court of Appeals' misstatement is not of sufficient importance to merit review.

1. There is no merit to petitioners' assertion that the Court of Appeals imposed discovery sanctions. Rather, the Court of Appeals drew justifiable inferences from defendants' failure to supply information in response to discovery requests and defendants' noncompliance with federal reporting requirements. In drawing these inferences, the Court of Appeals referred to the sanctions that may be imposed pursuant to Fed. R. Civ. P. 37(b)(2)(A) where a party does not comply with discovery, but certainly did not impose those sanctions. 865 F.2d at 1401, Pet. App. at 23a 24a. Petitioners' chief reason for seeking review is therefore utterly without basis.

2. The Court of Appeals' minor misstatement with respect to discovery orders does not alter the correctness of its decision on liability and is equally unworthy of review by this Court. Although

the record is clear that defendants did not provide information in response to discovery requests, the Court of Appeals incorrectly stated that defendants had not complied with discovery orders. The Court of Appeals made this misstatement in the course of listing a number of reasons for rejecting petitioners' argument that the District Court had erred in finding them liable. These reasons included defendants' failure to provide information in response to discovery requests, and defendants' failure to comply with federal reporting requirements, as well as federal audits which determined that defendants did not properly disburse child support collections. 865 F.2d at 1401-02, Pet. App. at 22a-25a.

In addition, and most significantly, the Court of Appeals based its liability finding on the uncontroverted evidence that defendants routinely violated federal law.

The record contains hundreds of defendants' admissions establishing that they illegally collected child support to which they had no legitimate claim. These admissions also prove that defendants retained the illegally collected child support for months or even years before making refunds to the former public assistance recipients to whom it belonged. In 60% of the cases defendants never refunded the correct amount. In none of the cases did the defendants provide any notice that they were holding plaintiffs' child support.

This evidence stands unrebutted. 865 F.2d at 1402, Pet. App. at 25a. Defendants did not come forward with an iota of evidence in rebuttal, even though all of the records were in defendants' control. Defendants did not even cite to a single case in which they did not commit one or more violations of class members' child support rights.

The Court of Appeals therefore correctly concluded, as did the District Court, that the evidence of class-wide violation justified injunctive relief. Because the decision below is correct, the petition should be denied.

3. Even if the Court of Appeals' inexactness undermined the correctness of its liability determination, the error would not warrant review. Certiorari jurisdiction does not exist for the purpose of correcting errors in lower court decisions where, as in this case, no broader issue is presented. See Ross v. Moffitt, 417 U.S. 600, 616-17 (1974). Moreover, this case is particularly fact-intensive: the liability decisions of the two lower courts turn solely upon the specific facts of this case. Certiorari is therefore not appropriate. See, e.g., NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170, 176 n.8 (1981).

II. THE COURT OF APPEALS DID NOT REQUIRE RETROACTIVE RELIEF OR PAYMENT OF ANY FUNDS FROM THE STATE TREASURY.

The Court of Appeals held that the District Court should have required the defendants to audit the records of class members in order to identify and notify class members whose child support is being illegally held. The Court of Appeals further held that the District Court should have required the defendants to refund to the class members the amount of any illegally collected child support which defendants had turned over to the federal government to the extent that defendants would receive reimbursement from the federal government for these refunds. These holdings are fully consistent with this Court's decisions construing the Eleventh Amendment.

1. The audit required by the Court of Appeals is necessary to prevent the ongoing violation of plaintiffs' procedural due process rights. Under the child support system, all applicants for AFDC benefits are required to assign their children's support rights to the state, whether or not there is a support order, and whether or not support is actually collected. 42 U.S.C. § 602(a)(26)(A); 45 C.F.R. § 232.11. Unless the state provides notice to recipients that support has been collected, recipients have no way of knowing whether and how much support the absent father is paying for the children. Recipients therefore have no way of knowing that the state is collecting support in excess of the AFDC benefits for the children or that the state is continuing to collect and keep their children's support payments after they are no longer receiving public assistance.

This case was filed in 1979. Defendants did not begin providing even rudimentary notice of support collections until 1986. 865 F.2d at 1402, Pet. App. at 27a-28a. Meanwhile, as the evidence established, defendants illegally collected and kept support payments to which they had no legitimate claim. Based on this unusual set of facts, the Court of Appeals held that the Due Process Clause of the Fourteenth Amendment requires defendants to provide "an accounting notice which includes the agency's calculations of support payments and AFDC assistance payments against which they are being offset" so that class members can "initiate collection efforts in the event of illegal retention of their support payments." 865 F.2d at 1404-05, Pet. App. at 39a-43a. Petitioners do not challenge this holding. Pet. at 12 n.2. However, petitioners argue that they are only required to provide

notice of child support which they collect in the future, and have no obligation to remedy their ongoing failure to provide notice of previous collections.

This Court could not adopt petitioners' narrow construction of the permissible scope of due process remedies without overruling the well-established principle that notice and an opportunity to be heard must be provided "before a State finally deprives a person of his property interests." Parratt v. Taylor, 451 U.S. 527, 540 (1981). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 899 (1988) (quoting Armstrong v. Manzo, 380 U.S. 545, 550 (1965)). At a minimum, the state must make available "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." Parratt,

451 U.S. at 539. Here, the class members have no way of knowing that they have property for which they can make a claim. The Court of Appeals' audit requirement simply provides them with a remedy for defendants' continuing violation of their procedural due process rights. There is no precedent whatsoever for petitioners' argument that the Eleventh Amendment bars a remedy for defendants' continuing refusal to provide the procedural protections required by due process.

Because the audit mandated by the Court of Appeals is designed to prevent defendants' continued denial of plaintiffs' rights to notice of the deprivation of their property, the remedy is prospective, not retrospective, and is not foreclosed by the Eleventh Amendment: "[R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even

though accompanied by a substantial ancillary effect on the state treasury." Papasan v. Allain, 478 U.S. 265, 278 (1986) (citing Milliken v. Bradley, 433 U.S. 267, 289-90 (1977), and Edelman v. Jordan, 415 U.S. 651, 667-68 (1974)).

Quern v. Jordan, 440 U.S. 332 (1979), on which petitioners rely, does not foreclose the relief ordered by the Court of Appeals in this case. Unlike this case, Quern did not involve the taking of vested private property rights with no notice or opportunity to be heard. The question in Quern was whether a federal court has the power to order state officials to provide a brief explanatory notice to public aid applicants of the availability of state procedures to determine whether they are eligible for past benefits which they were erroneously denied.[5] There was no

[5] The Court in Quern affirmed the court of appeals' approval of a limited form of notice which gave the class members

procedural due process issue.[6] Consequently, Quern only addressed the extent to which notice relief may be ancillary to other prospective relief so as not to be barred by the Eleventh Amendment.

In this case, unlike Quern, the audit required by the Court of Appeals is not merely ancillary to other prospective

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"no more . . . than what they would have gathered by sitting in the courtroom." 440 U.S. at 346-49. As this Court later stated, the court of appeals' notice was "justified as a mere case-management device" ancillary to other prospective relief. Green v. Mansour, 474 U.S. 64, 71 (1985).

[6] Plaintiffs in Quern had challenged the state's delays in processing and approving public assistance applications as violating the federal regulations and the Equal Protection Clause. See Edelman v. Jordan, 415 U.S. 651, 655-56 (1974). There was no claim that the state had violated either the Due Process Clause or federal regulations which require notice to public assistance applicants of any action by the state agency affecting their claims for benefits. See 45 C.F.R. § 205.10(a)(3). The Quern plaintiffs had apparently been afforded all of the process to which they were entitled.

relief, but is prospective relief, necessary to correct defendants' ongoing violations of plaintiffs' due process rights. The limitations imposed on the notice in Quern are therefore inapplicable. Nothing in Quern prevents a federal court from ordering state officials to provide the notice required by the Due Process Clause so that the class members can assert their rights to any child support payments which defendants have illegally retained. Class members who have no way of knowing whether defendants have already illegally collected and kept their child support payments are no less entitled to notice and an opportunity for a hearing than are class members whose support is currently being collected by defendants. Where notice is necessary to prevent ongoing deprivations of constitutional rights, the Eleventh Amendment limitation on the Article III power of federal courts does not bar a

federal court from ordering notice as an independent form of relief. Accord, Green v. Mansour, 474 U.S. 64, 71 (1985).

2. Pursuant to the Court of Appeals' decision, the defendants must refund illegally collected child support only "to the extent that [they] will be reimbursed by the United States" for such refunds. 865 F.2d at 1408, Pet. App. at 59a. This holding also does not conflict with any decisions of this Court. The Court of Appeals did not, as petitioners assert, order defendants to pay "retroactive benefits" or levy any "expense [which] will be borne by the state treasury." Pet. at 37; i. Because the Court of Appeals did not impose any liability which must be paid from the state's general revenues, its decision is fully consistent with Edelman v. Jordan, 415 U.S. 651 (1974).

Under the federal child support scheme, when the state retains child

support collections made on behalf of AFDC recipients, it is required to reimburse the federal government to the extent of the federal government's participation in the financing of the AFDC benefits paid by the state. 42 U.S.C. § 657(b)(2), (4). The federal share of the collection is not actually sent to the federal treasury. Instead, the federal share of the child support collection is used to reduce the amount which the state can draw from the federal treasury for the state's AFDC program. 42 U.S.C. § 603(b); 45 C.F.R. § 201.5.

If the state collects and retains a child support payment which should have been distributed to a current or former AFDC recipient, then the federal allocation to the state for the quarter after the collection is reported is incorrectly reduced by an amount equal to the federal share of the collection. When the error is

discovered, it is corrected by increasing the federal government's allocation to the state for the next quarter. 42 U.S.C. § 603(b)(2). Consequently, as the Court of Appeals concluded, an order requiring the state to return to plaintiffs the federal share of the child support payments which the state has illegally collected and retained has no impact whatsoever on the state treasury because the state's allocation for the next quarter will be correspondingly increased.

The child support reimbursement scheme is therefore fundamentally different from the matching system for public assistance benefits which were at issue in Edelman. In the case of federal-state public assistance benefits, the federal government's share is paid only as a match for state expenditures. 42 U.S.C. § 603(a),(b). See Shea v. Vialpando, 416 U.S. 251, 253 (1974). The federal share

will not be paid unless the state matches the payment. Consequently, an order for payment of the federal share of federal-state public assistance benefits would necessarily require payment of the state share, a result which Edelman expressly prohibits. On the other hand, an order requiring the state to refund the federal share of an erroneously collected child support payment would not entail return of the share which the state has retained, and is not barred.

The Court of Appeals' interpretation of Edelman is in accord with the decisions of other courts of appeals which have held that retroactive relief requiring the state to pay government benefits is not barred by the Eleventh Amendment where the state will be reimbursed for the payment by the federal government. See, e.g., Foggs v. Block, 722 F.2d 933, 941 n.6 (1st Cir. 1983), rev'd on other grounds sub nom.

Atkins v. Parker, 472 U.S. 115 (1985); Harrington v. Blum, 639 F.2d 768 (2d Cir. 1980), aff'g per curiam 483 F. Supp. 1015, 1021 (S.D.N.Y. 1979).[7] See also Robinson v. Block, 869 F.2d 202, 214 n.11 (3d Cir. 1989). Thus, where a state can pay for retroactive relief without using state funds, the Eleventh Amendment does not bar an order to make payment. See Fernandez v.

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[7] A number of other courts since Edelman have also explicitly held that the Eleventh Amendment does not bar an order requiring a state to pay for retroactive relief for which the state would be reimbursed by the federal government. See, e.g., Wilson v. Lyng, 662 F. Supp. 1391, 1396 (N.D.N.C. 1987), rev'd on other grounds, 856 F.2d 630 (4th Cir. 1988); Collins v. Marshall, 507 F. Supp. 83, 85 (W.D. Mo.), rev'd on other grounds sub nom. Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981); Witter v. Pennsylvania National Guard, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978). However, two cases have held that an order to pay retroactive federal food stamps was barred where, in contrast with this case, there were no ongoing violations of federal law. Cotton v. Mansour, 863 F.2d 1241 (6th Cir. 1988); Colbeth v. Wilson, 554 F. Supp. 539 (D. Vt.), aff'd per curiam sub nom. Colbeth v. O'Rourke, 707 F.2d 57 (2d Cir. 1983).

Chardon, 681 F.2d 42, 59 (1st Cir. 1982), aff'd on other grounds sub nom. Chardon v. Fumero Soto, 462 U.S. 650 (1983).

The rule prohibiting a retroactive award of public benefits to be paid from state funds rests on the concept that the state's power to allocate scarce tax revenues is essential to its sovereignty. As this Court noted in Edelman,

> [W]here the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods . . . , the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

415 U.S. at 666 n.11. The Court of Appeals' requirement that defendants refund the illegally collected child support to the extent that they will be reimbursed by the federal government, like the relief

ordered in the cases dealing with wholly federally funded benefits, would not affect the state's ability to allocate scarce tax revenues. The Eleventh Amendment is not implicated by relief which would have no impact on state funds.

Indeed, because of the unusual circumstances of this case, the Court of Appeals' order does not involve the payment of funds that belong to either the federal or the state governments, but only the return of that portion of plaintiffs' property which the federal government is holding because of the state's illegal collection. Far from requiring payment of state funds, as petitioners argue, the relief ordered by the Court of Appeals does not even require payment from federal tax revenues. Because the relief ordered by the Court of Appeals would not be paid with either state or federal funds, it is not barred by the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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